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TREATISE

ON THE LAW GOVERNING

NUISANCES

WITH

PARTICULAR REFERENCE TO ITS APPLICATION TO MODERN CONDITIONS AND COVERING THE ENTIRE LAW RELATING TO PUBLIC AND PRIVATE NUISANCES

INCLUDING

STATUTORY AND MUNICIPAL POWERS AND REMEDIES, LEGAL AND EQUITABLE

BY

JOSEPH A. JOYCE AND HOWARD C. JOYCE

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PREFACE.

The question of Nuisances has always been a much litigated and vexatious one, and the courts in recent years, while litigation on this subject has been increasing, have been called upon to adjudicate in numerous cases the relative rights of the public and of individuals. This has been especially true in matters of trade and business where the rights of the respective parties must be carefully weighed in order that neither the public nor the individual shall suffer nor the prosecution of a legitimate business be impaired. As both manufacturing industries and the population of the cities and towns have increased, these questions of relative rights have more frequently arisen. As a natural result the state through its legislative and municipal bodies has provided, to a considerable extent, for the prevention and abatement of nuisances. The rights of one engaged in a business or manufacturing enterprise are fully treated, and in this connection are presented and discussed the right of the legislature and of municipal bodies to prevent and abate nuisances arising therefrom. The power of the legislature, also, to legalize an act which might otherwise be a nuisance or to declare certain things to be nuisances is one of importance which has been given especial attention. The authors have also treated more particularly those matters which are of importance under the modern law relating to this subject. This has been true of the law of nuisances affecting highways and waters, which have been fully covered, both as to the rights of the public, of the individual, and of abutting and riparian owners. One of the frequent nuisances also complained of at the present time is that caused by smoke, which has been exhaustively considered in its various aspects. With the intention that this work should be of especial value to the court and the profession generally,

each chapter has also been made complete and distinct within itself. General principles are stated and specific application made thereof. The questions of rights by prescription, the various alleged nuisances, such as noisome smells and noises, jars and vibrations, nuisances arising from animal enclosures and other causes, of remedies in cases of a nuisance, the rights to summarily abate, and of damages have been thoroughly examined and discussed.

The authors have endeavored to confine themselves strictly to the questions connected with the law relating to nuisances and to present a work which treats only of that law in a complete, thorough and logical manner. With the hope that this treatise will be found of value, it is respectfully submitted to the profession.

JOSEPH A. JOYCE & HOWARD C. JOYCE.

NEW YORK, 1906.

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THE LAW OF NUISANCES.

CHAPTER I.

DEFINITIONS.

SECTION 1. Precise, technical definition of nuisance impracticable.
2. General definition—Nuisance.
3. Blackstone's general definition.—Nuisance.
4. Statutory or code definitions.—Nuisance.
5. Public or common nuisance defined.
6. Hawkins' and Blackstone's definitions.—Public nuisance.
7. Statutory or code definitions.—Public nuisance.
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9. Blackstone's definition.—Private nuisance.
10. Statutory or code definitions.—Private nuisance.
11. Nuisance defined with relation to the *maxim sic utere*, etc.
12. Nuisance *per se* defined.

§ 1. Precise, technical definition of nuisance impracticable.—It is not practicable to give other than a general definition of what constitutes a nuisance. A precise, technical definition, applicable at all times to all cases, cannot be given, because of the varying circumstances upon which the decisions are based. To this there is the exception generally of what is designated as a nuisance *per se*. The only approximately accurate method of determining the meaning of the term nuisance is to examine the cases adjudicating what are and are not nuisances.[1] It is said in a California case that: "It would tax the acumen of the wisest body of lawmakers to describe with particularity every act the doing of which in our complicated civilization would constitute a nuisance," and where the legislature declares in general language what constitutes a nuisance it should be determined whether the act charged comes within the class.[2] So it is declared in an English case that: "It is ex-

1. See Norcross v. Thoms, 51 Me. 503, 504, 81 Am Dec. 588, per curiam; Ellev v. Koehler, 68 Ohio St. 51, 67 N. E. 89, 12 Am. Neg. Rep. 659, per curiam. See, also, Hoadley v. Seward & Son Co., 71 Conn. 640, 646, 42 Atl. 997, per Andrews, C. J.

2. People v. Lee, 107 Cal. 477, 481, 482, 40 Pac. 754, per Henshaw, J., in argument in opinion in election law case as to impracticability of enumerating certain offenses. "The definitions and rules applicable to cases as they may arise

tremely difficult to lay down any actual definition of what constitutes an injury, because it is always a question of compound facts, which must be looked to to see whether or not the mode of carrying on a business did or did not occasion so serious an injury as to interfere with the comfort of life and enjoyment of property.[3] It is also true that one of the great difficulties in defining a nuisance technically is to describe the degree of annoyance necessary to cause the actionable injury.[4]

§ 2. **General definition—Nuisance.**[5]—A nuisance may generally be defined as anything that works or causes injury, damage, hurt, inconvenience, annoyance, or discomfort to one in the enjoyment of his legitimate and reasonable rights of person or property; or that which is unauthorized, immoral, indecent, offensive to the senses, noxious, unwholesome, unreasonable, tortious, or unwarranted, and which injures, endangers or damages one in an essential or material degree in, or which materially interferes with, his legitimate rights to the enjoyment of life, health, comfort, or property, real or personal. A nuisance may exist not only by reason of doing an act, but also by omitting to perform a duty.[6]

must be general and each case must be brought to the test of the principles laid down." Barnes v. Hathorn, 54 Me. 124, 128, per Kent, J.

3. St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642, 652, 35 L. J. Q. B. 66, 13 W. R. 1083, 12 Law T. 776, 11 Jur. N. S. 785, per Lord Cranworth.

4. See Crawford v. Atglen Axle & Iron Mfg. Co., 1 Chest. Co. Rep. (Pa.), 412, per Clayton, P. J. See § 19 herein as to nuisance being a question of degree.

5. See, also, § 11 herein.

6. "Anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights." Cooley on Torts, 565, quoted in North Shore St. Ry. Co. v. Payne, 192 Ill. 239, 245, 61 N. E. 467, per Cartwright, J.

Any lawful business conducted in such manner as to cause annoyance or materially interfere with the ordinary comfort of human existence, is a nuisance. Seacord v. People, 22 Ill. App. 279, case aff'd, 121 Ill. 623, 13 N. W. 194, 10 West. 915.

"A 'nuisance' in its ordinary signification, is anything that produces an annoyance—anything that disturbs or is offensive." Bliss v. Grayson, 24 Nev. 422, 454, 56 Pac. 231, per Massey, J.

"Whatever is offensive physically, to the senses, and by such offensiveness makes life uncomfortable, is a nuisance." Westcott v. Middleton, 43 N. J. Eq. 478, 486, 11 Atl. 490,

§ 3. **Blackstone's general definition—Nuisance.**—"Nuisance *nocumentum*, or annoyance, signifies anything that worketh hurt,

10 Cent. 202; Cleveland v. Citizens Gas Light Co., 24 N. J. Eq. 201, 106.

"A nuisance, as it is ordinarily understood, is that which is offensive and annoys or disturbs." Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 32, 25 N. E. 246, 9 L. R. A. 711, 33 N. Y. St. R. 246, per Haight, J., in dissenting opinion.

"In judgment of law, whatever may be obnoxious or offensive to the senses, either of sight, hearing or smell, or which will render the enjoyment of life or property unwholesome or uncomfortable, is a nuisance." Stilwell v. Buffalo Riding Academy, 21 Abb. N. C. (N. Y.), 472, 473, 4 N. Y. Supp. 414, per Daniels, J. (Building for keeping horses.)

"Perhaps it would be too broad a proposition to be held that anything, under every kind of circumstances, which lessens comfort, or endangers the health or safety of a neighbor, is actionable as a nuisance." Campbell v. Seaman, 2 T. & C. (N. Y.), 231, 234, per P. Potter, J.

"'Nuisance, something noxious or offensive. Anything not authorized by law which maketh hurt, inconvenience or damage.'" "'The term 'nuisance,' derived from the French word 'nuire,' to do hurt or to annoy, is applied in the English law indiscriminately to infringements upon the enjoyment of proprietary and personal rights.'" Village of Cardington v. Fredericks, 46 Ohio St. 442, 446, 21 N. E. 766, per Spear, J. (a case of obstruction of street), quoting Cockran's Law, Lex. 192, Addison on Torts, 361.

"Anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights." "'As the definition assumes the existence of wrong, those things which may be annoying and damaging, but for which no one is at fault, are not to be deemed nuisances, though all the ordinary consequences of nuisances may flow therein.'" Railroad Co. v. Carr, 38 Ohio St. 448, 453, 43 Am. Rep. 428, quoting Cooley on Torts, 365, 366.

"Anything which unlawfully and tortiously does hurt, or causes inconvenience, discomfort or damage to another." McClung v. North Bend C. & C. Co., 9 Ohio Cir. Ct. 259, 2 Ohio Dec. 531.

"Anything that unlawfully hurts, annoys, or causes inconvenience to another." Crawford v. Atglen Axle & Iron Mfg. Co., 1 Chest. Co. Rep. (Pa.), 412, per Clayton, P. J.

"Injury to property, with reference to its reasonable and ordinary use, by continuous hurtful acts, constitutes a nuisance undoubtedly." Sparhawk v. Union Pass. Ry. Co., 54 Pa. 401, 421, per Thompson, J.

"'A nuisance' is a term for all practices, avocations, erections, establishments, etc., against which courts will give relief, although they are not intrinsically criminal, because of their tendency to create annoyance, ill health or inconvenience." Gifford v. Hulett, 62 Vt. 342, 346, 19 Atl. 230, per Taft, J. (A case of a barn.) Citing Abb. Law Dict.

"The word 'noxious' includes the complex idea, both of insalubrity and

inconvenience or damage."[7] This author also defines a nuisance as

offensiveness." Rex v. White, 1 Burr. 333, 337, per Denison, J.

"The real question in all the cases is the question of fact, viz., whether the annoyance is such as materially to interfere with the ordinary comfort of human existence." Crump v. Lambert L. R., 3 Eq. 409, 413, per Lord Romilly, M. R., citing St. Helen's Smelting Co. v. Tipping, 11 H. L. C. 642.

"Anything not warranted by law, which annoys and disturbs one in the use of his property, rendering its ordinary use and occupation uncomfortable to him, is a nuisance. If the annoyance is such as to materially interfere with the ordinary comfort of human existence, it is a nuisance." Nolan v. New Britain, 69 Conn. 668, 678, 38 Atl. 703, per Andrews, C. J. (A case of pollution of a watercourse.) Citing Baltimore R. R. v. Fifth Bapt. Church, 108 U. S. 317; Crump v. Lambert, L. R. 3 Eq. 409, 413, per Lord Romilly.

"'Any injury to lands or houses, which renders them useless or even uncomfortable for habitation, is a nuisance." I. Hilliard on Torts (4th ed.), p. 584, quoted in Haag v. Board of Comm'rs of V. Co., 60 Ind. 511, 513, per Niblack, J. (a pest house case).

"An injury to lands or houses which renders them useless, or even uncomfortable for habitation, is a nuisance." Norcross v. Thoms, 51 Me. 503, 505, 81 Am. Dec. 588; Howard v. Lee, 3 Sand. (N. Y.), 281, 283.

"Nuisances to one's dwelling house are all acts done by another which render the enjoyment of life within the house uncomfortable, whether it be by infecting the air with noisome smells, or with gases injurious to health." Cropsey v. Murphy, 1 Hilt. (N. Y.), 126, 127, per Brady, J., citing 2 Greenl. Ev. p. 467. Same definitions in Ellis v. Kansas City St. J. & C. B. R. Co., 63 Mo. 131, 135, per Norton, J. (Alleged nuisance being animals' carcass.)

"It is not necessary that the smell should be unwholesome; it is enough if it renders the enjoyment of life and property uncomfortable." Rex v. White, 1 Burr. 333, 337, per Lord Mansfield.

"In proof of damages it is sufficient for plaintiff to show by reason of the injurious act or omission of the defendant he cannot enjoy his right in as full and ample a manner as before, or that his property is substantially impaired in value." Cropsey v. Murphy, 1 Hilt. (N. Y.), 126, 127, per Brady, J.

"To make out a case of special injury to property from nuisance, something materially affecting its capacity for ordinary use and enjoyment must be shown." Sparhawk v. Union Passenger Ry. Co., 54 Pa. St. 401.

"Everything that disturbs in an unreasonable degree the quiet enjoyment of a home or dwelling house is a nuisance." Wallace v. Auer, 10 Phila. (Pa.), 356, 357.

"That is a nuisance which annoys or disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncom-

"whatsoever unlawfully annoys or does damage to another."[8]

fortable to him." Baltimore & Pot. R. R. Co. v. Fifth Bapt. Church, 108 U. S. 317, 329.

"What makes life less comfortable, and causes sensible discomfort and annoyance, is the proper subject of injunction." Fleming v. Hislop, 11 App. Cas. 686, 697, per Lord Halsbury; quoted in Reinhardt v. Mentasti (Ch. Div.), 61 Law T. Rep. N. S. 328, 330, 40 Alb. L. J. 490, per Keepewich, J. This case is criticised in Sanders-Clark v. Grosvenor Mansion Co. L'd (1900), 2 Ch. 373, 374, 375, 69 L. J. Ch. 579, 580, 581, 82 Law T. N. S. 758, 48 Wkly. Rep. 570, per Buckley, J., as to reasonable use of property.

"The violation of the duty which one owes to another under the maxim *sic utere*, etc., is the best general description of a nuisance." Powell v. Bentley & Gernig Fur Co., 34 W. Va. 804, 807, 809, 12 L. R. A. 53, 12 S. E. 1085.

7. Barnes v. Hathorn, 54 Me. 124, 126, per Kent, J., id. 131, per Dickerson, J. (a tomb erected on one's own land); 3 Bl. Comm., * 216; State v. Mayor and Aldermen of Mobile, 5 Port. (Ala.), 279, 311, 30 Am. Dec. 564, per Collier, J. ("Anything that worketh inconvenience" is a nuisance. A case of obstruction of highway by market house, citing 1 Russell on Crimes, 295). Quoted in New York & N. E. R. R. Co.'s appeal, 58 Conn. 532, 541 (applied to grade crossings); Baldwin v. Ensign, 49 Conn. 113, 117, 44 Am. Rep. 205; Tomle v. Hampton, 129 Ill. 379, 384, 21 N. E. 800; Norcross v. Thoms, 51 Me. 503, 504, 81 Am. Dec. 588; Veazie v. Dwinel, 50 Me. 479, 481, per Rice, J. (a case of obstruction of unnavigable river but "floatable stream"); State v. Haines, 17 Shep. (30 Me.), 65, 74, per Shepley, C. J. (a case of indictment for keeping a bowling alley); Kansas City v. McAleer, 31 Mo. App. 433, 436, per Ellison, J. (a case of power of city to define and abate a nuisance); Farrell v. Cook, 16 Neb. 483, 485, 20 N. W. 720, 49 Am. Rep. 721, per Maxwell, J. (a case of standing stallions or jacks); Wolcott v. Melick, 11 N. J. Eq. 204, 206, 207, 66 Am. Dec. 790, per The Chancellor (a case of power of equity to abate); Lawton v. Steele, 119 N. Y. 226, 235, 16 Am. St. Rep. 813, 29 N. Y. St. Rep. 581, 995, 23 N. E. 878, 7 L. R. A. 134 (in connection with legislative power to declare what are nuisances); Meeker v. Van Rensselaer, 15 Wend. (N. Y.), 397, 389, per Savage, C. J. (citing Jacobs L. Dict.); Cooper v. Hull, 5 Ohio, 321, 323, citing 3 Petersdorff's Common Law, 550 ("The term nuisance signifies anything that causes him inconvenience, annoyance or damage"), cited in Columbus Gas Light & Coke Co. v. Freeland, 12 Ohio St. 392, 397; Ellis v. Academy of Music, 120 Pa. 608, 622, 6 Am. St. Rep. 739, 15 Atl. 494, per Gordon, C. J. (a case of right to use an alley and second action for continuance of same nuisance); Lancaster Turnpike Co. v. Rogers, 2 Pa. 114, 115, 44 Am. Dec. 179, per Burnside, J. (a case of a toll-house and gate); Comminge & Geisler v. Stevenson, 76 Tex. 642, 644, 13 S. W. 556, per Acker, P. J. ("'a thing that worketh hurt, in-

"The common definition of nuisance—'anything that worketh hurt, inconvenience or damage'—is to be understood with reference to the subject-matter, the time, manner, occasion and degree of discomforts, and the mutual adjustment of the common sacrifices of comforts incident to civil society."[9]

§ 4. **Statutory or Code definitions—Nuisance.**—Several codes or statutes provide that: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property,[10] or unlawfully obstructs the free pas-

convenience and damage'" to one "in both his person and property, in violation of his right to enjoy his property free from such hurt, inconvenience and damage"); Miller v. Burch, 32 Tex. 208, 211, 5 Am. Rep. 242; Burditt v. Stevenson, 17 Tex. 489, 502, 67 Am. Dec. 665, per Wheeler, J.; State v. Carpenter, 68 Wis. 165, 173, 31 N. W. 730, 60 Am. Rep. 848, per Orton, J. (a case of alleged obstruction of use of navigable river); Mohr v. Gault, 10 Wis. 513, 517, 78 Am. Dec. 687, per Dixon, C. J. (a case of obstruction of running stream by washing down its banks); United States v. Debs, 64 Fed. 724, 739, 740, per Woods, C. J. (a case of power of equity to restrain public nuisance); Payne v. Kansas & A. Val. R. Co., 46 Fed. 546, 554, per Parker, J. (a question of equity jurisdiction).

8. 3 Bl. Comm., * 5; King v. Davenport, 98 Ill. 305, 315, 38 Am. Rep. 89, per Sheldon, J. (a case of power to abate nuisance); United States v. Douglas, Willan Sartoris Co., 3 Wyo. 287, 294, 22 Pac. 92, per Sanfley, J. (a case of public lands and erection of fence).

9. Barnes v. Hathorn, 54 Me. 124, 131, per Dickerson, J., in dissenting opinion.

10. *California* Code of Civ. Proc. § 731, cited or quoted in: Phelan v. Quinn, 130 Cal. 374, 379, 62 Pac. 623 (nuisance in private way); Fisher v. Zumwalt, 128 Cal. 493, 496, 61 Pac. 82; Hardin v. Sin Claire, 115 Cal. 460, 463, 47 Pac. 363 (obstruction of right of way); San Francisco v. Buckman, 111 Cal. 25, 30, 43 Pac. 396 (obstruction of street); Bowen v. Wendt, 103 Cal. 236, 238, 37 Pac. 149 (polluting waters of creek); Gardner v. Stroever, 89 Cal. 26, 29, 26 Pac. 618 (obstruction of highway); Welsh v. County of Plumas, 80 Cal. 338, 343, 22 Pac. 254 (obstruction of use of plaintiff's property); Grandona v. Olson, 78 Cal. 611, 616, 21 Pac. 366, 12 Am. St. Rep. 121; Learned v. Castle, 78 Cal. 454, 464, 18 Pac. 872, 21 Pac. 11 (as to right to abate alleged nuisance by mandatory injunction and to recover damages); Tuebner v. California St. R. Co., 66 Cal. 171, 174, 4 Pac. 1162 (use of one's own property so as not to interfere with another); People v. Gold Run

sage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square,

Ditch & M. Co., 66 Cal. 138, 151 (discharge of mining debris into navigable waters); Lytle Creek Water Co. v. Perdew, 65 Cal. 447, 455 (diversion and appropriation of waters of stream); Meyer v. Metzler, 51 Cal. 142, 144 (obstruction to free use of property by projecting wall); Pract. Act, § 249, cited in: Schulte v. North Pacific Transp. Co., 50 Cal. 592, 594 (obstruction of street, "property injuriously affected") Hopkins v. Western Pac. R. Co., 50 Cal. 190, 194 (obstruction in street in nature of nuisance); Courtwright v. Beav. River & W. & M. Co., 30 Cal. 573, 576 (a case of jurisdiction to abate nuisances); Blac v. Klumpke, 29 Cal. 156, 159 (public or private nuisance erected in highway by water). See, also, Civ. Code, § 3479, and citations thereto in next following note herein. See, also, Penal Code, § 370, cited in: Siskiyou Lumber & Mer. Co. v. Rostel, 121 Cal. 511, 513 (obstruction to public street or highway; public or private rights of action); People v. Truckee Lumber Co., 116 Cal. 397, 399, 39 L. R. A. 581, 48 Pac. 374, 58 Am. St. Rep. 183 (pollution of river and injury to fish); Vanderhurst v. Tholcke, 113 Cal. 147, 150, 35 L. R. A. 267, 45 Pac. 266 (obstruction to free use of public street is a nuisance; power of city to abate); People v. Lee, 107 Cal. 477, 481, 40 Pac. 754 (in argument in opinion as to impracticability of enumerating certain offenses in statute; an election law case); Taylor v. Reynolds, 92 Cal. 573, 574, 28 Pac. 688 (obstruction of street or sidewalk in city is public nuisance); *Ex parte* Taylor, 87 Cal. 91, 92, 93, 96, 25 Pac. 258 (validity of ordinance as to obstruction of sidewalk); *Ex parte* Lehmkuhl, 72 Cal. 53, 13 Pac. 148 (*habeas corpus* for one charged with offense against State in commission of nuisance by obstructing street); In the Matter of Horace Hawes, 68 Cal. 412, 413 (writ of prohibition against trial of one charged with public nuisance).

Idaho Codes 1901 (Civ. Code), 2964 (Civ. Proc.), § 3373.

Indiana.—Burn's Rev. Stat. 1901, § 290 (R. S. 1894, §§ 290, 292; R. S. 1881, §§ 289, 291); Thornton's Rev. Stat. 1897, § 292; Horner's Rev. Stat. 1897, § 289 (2 G. & H. § 628, p. 288).

The statute uses the words "Whatever is injurious," etc., and in the last clause it reads "so as to essentially interfere," etc. State v. Ohio Oil Co., 150 Ind. 21, 36, 49 N. E. 809, 47 L. R. A. 627, per McCabe, J.; Williamson v. Yingling, 93 Ind. 42, 51, per Best, C. (a case of abatement of mill dam); Haag v. Board of Comm'rs of V. Co., 60 Ind. 511, 513, per Niblack, J. (a pest house); Ohio & Mississippi Ry. Co. v. Simon, 40 Ind. 278, 284 (a case of noise and smells from cattle pens); Smith v. Fitzgerald, 24 Ind. 316; Hackney v. State, 8 Ind. 494, 497; Shroyer v. Campbell, 31 Ind. App. 83, 67 N. E. 193; State v. Herring, 21 Ind. App. 157, 48 N. E. 598, 599, 600, per Wiley, J. (a case of befouling public

street, or highway, is a nuisance."[11] Another definition is as follows: "A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either: 1. Annoys, injures or endangers the comfort, repose, health or safety of others; or, 2. Offends decency; or, 3. Unlawfully interferes with, ob-

stream and of jurisdiction); Paragon Paper Co. v. State, 19 Ind. App. 314, 49 N. E. 600, 602, per Robinson, C. J. (a case of befouling water by corporation). See, also, under Burn's Rev. Stat. 1894, § 2154 (Rev. St. 1881, § 2066), Valparaiso v. Moffit, 12 Ind. App. 250, 39 N. E. 909, 911, per Lotz, J. (a case of pollution of water).

Iowa Code, § 4302, which uses the words, "Whatever is injurious to health," etc., and also, "so as essentially to interfere," etc. Percival v. Yousling, 120 Iowa, 451, 94 N. W. 913. See, also, Van Fossen v. Clark, 113 Iowa, 86, 84 N. W. 989, 52 L. R. A. 279.

Minnesota Stat. 1894, § 5881.

Montana Civ. Code (Codes 1895), § 4550.

Nevada Comp. Laws (Cutting's Annot.) 1900, § 3346: "Rule of the common law was practically adopted by our Statute." Bliss v. Grayson, 24 Nev. 422, 454, 56 Pac. 231, per Massey, J. See, also, Gen. Stat., § 3273, same as text.

Utah Rev. Stat. 1898, § 3506, North Point C. I. Co. v. Utah & S. L. Co., 16 Utah, 246, 270, 67 Am. St. Rep. 607, 8 Am. & Eng. Corp. Cas. N. S. 98, 40 L. R. A. 851, 52 Pac. 168.

Ballinger's Annot. Codes and Stat. Wash. 1897, § 5660, also uses the words, "So as to essentially interfere," etc., in last clause.

11. *California* Civ. Code, § 3479, Spring Valley Waterworks v. Fifield, 136 Cal. 14, 68 Pac. 108; Adams v. City of Modesto, 131 Cal. 501, 502, 63 Pac. 1083 (open sewer used by city); County of Los Angeles v. Spencer, 126 Cal. 670, 673, 59 Pac. 202, 77 Am. St. Rep. 217 (power of legislature to declare that to be a nuisance which is such in fact); People v. Truckee Lumber Co., 116 Cal. 397, 399, 39 L. R. A. 581, 48 Pac. 374, 58 Am. St. Rep. 183 (pollution of river and injury to fish); San Francisco v. Buckman, 111 Cal. 25, 30, 43 Pac. 396 (obstruction of street); *Ex parte* Taylor, 87 Cal. 91, 93, 25 Pac. 258 (validity of ordinance as to obstruction of sidewalk); Cardwell v. County of Sacramento, 79 Cal. 347, 348, 21 Pac. 763 (obstruction of navigable river); People v. Park & Ocean R. R. Co., 76 Cal. 156, 160, per Searles, P. J. (a case of railroad in a public park); Shirley v. Bishop, 67 Cal. 543, 546, 8 Pac. 82 (nuisance in navigable waters); People v. Gold Run River Ditch & M. Co., 66 Cal. 138, 147, 151, 4 Pac. 1152, 56 Am. Rep. 80 (discharge of mining debris into navigable stream); Lytle Creek Water Co. v. Perdew, 65 Cal. 447, 455, 4 Pac. 426 (diversion and appropriation of waters of stream). See Penal Code, § 370, and citations thereto under last preceding note herein.

structs or tends to obstruct or render dangerous for passage any lake or navigable river, bay, stream, canal or basin, or any public park, square, street or highway; or, 4. In any way renders other persons insecure in life or in the use of property.[12] Again, a nuisance is also defined as "anything which worketh hurt, inconvenience, or damage, to another; and the fact that the act done may otherwise be lawful does not keep it from being a nuisance. The inconvenience complained of must not be fanciful, or such as would affect only one of fastidious taste, but it must be such as would affect an ordinary reasonable man."[13] The Maine statute also defines certain nuisances and makes provisions concerning them.[14] Under the Nuisance Removal Act "the word 'nuisance'

Idaho Codes 1901 (Civ. Code), § 2964 (Civ. Proc.), § 3373.

Minnesota.—See § 7 herein, statutory, etc., definition—Public nuisance.

Utah—See § 7 herein, statutory, etc., definition—Public nuisance.

Montana Civ. Code (Codes 1895), § 4550. See Penal Code, § 672.

Washington.—"The obstruction of any highway, or the closing of the channel of any stream used for boating or rafting logs, lumber, or timber," is a nuisance. Ballinger's Annot. Codes and Stat. 1897, § 5660.

12. *North Dakota.*—Rev. Codes 1899 (Civ. Code), § 5056.

South Dakota.—Grantham's Stat. 1901 (Civ. Code), § 5884; Rev. Codes 1903, p. 861 (Civ. Code), § 2393.

Washington. — Ballinger's Annot. Codes and Stats. 1897, § 3086.

State v. Paggett, 8 Wash. 579, 582, 36 Pac. 487, per Stiles, J. (a case of maintenance of powder magazine, quoting Code 1881, § 1235, and considering Gen. Stat. § 2895). Code definition of Wash. Ty. is quoted in Northern Pac. R. R. v. Whalen, 149 U. S. 157, 162, 163, per Gray, J. (a case of saloons along railway line).

13. 2 Ga. Civ. Code 1895, § 3861; Hill v. McBurney Oil & Fertilizer Co., 112 Ga., 788, 793, 52 L. R. A. 398, 38 S. E. 42, where Simmons, C. J., says: "This, we think, is not intended to change the common law definition of a nuisance." Weiter v. Campbell, 60 Ga. 266, 268; Phinizy v. City Council of Augusta, 47 Ga. 260, 266; Vason v. South Carolina R. R., 42 Ga. 631, 636; Cooker v. Birge, 9 Ga. 425, 54 Am. Dec. 347. See, also, as to Ga. Code, §§ 2948, 2949; Center & Treadwell v. Davis, 39 Ga. 210, 218, per Warner, J. (a case of lessor and lessee).

14. Me. Rev. Stat. 1903, pp. 269-273, chap. 22; R. S. C. 17, § 5 (which is § 5 of C. 22, R. S. 1903), is considered in Varney v. Pope, 60 Me. 192, 194, per Appleton, C. J. (a case of injunction against a mill dam). See, also, Mass. Rev. Laws 1902, covering nuisances "in general; Burnt and Dangerous Buildings; Causes of Sickness, etc.; Liquor, etc.; Offen-

under this act shall include any pool, ditch, gutter, water course, privy, urinal, cesspool, drain, or ashpit so foul as to be a nuisance or injurious to health." [15]

§ 5. **Public or common nuisance defined.**—A public or common nuisance is an offense against the public order and economy of the State, by unlawfully doing any act or by omitting to perform any duty which the common good, public decency or morals, or the public right to life, health, and the use of property requires, and which at the same time annoys, injures, endangers, renders insecure, interferes with, or obstructs the rights or property of the whole community, or neighborhood, or of any considerable number of persons; even though the extent of the annoyance, injury, or damage may be unequal or may vary in its effect upon individuals. Another factor in defining a nuisance is, that consideration should be given to places where the public have the legal right to go or congregate, or where they are likely to come within the sphere of its influence.[16] A nuisance is not public though it may injure a

sive Trades; Private Nuisances; Smoke Nuisances." R. I. Gen'l Laws 1896, p. 308, tit. XIV, c. 92. The statutes or codes of the several States also make some provision in regard to nuisances.

15. Applied in St. Helen's Chemical Co. v. The Corporation of St. Helens, L. R. Exch. 196.

16. A public nuisance affects the community at large, or some considerable portion of it, such as the inhabitants of a town. Hundley v. Harrison, 123 Ala. 292, 296, 26 So. 294, per Haralson, J., citing 16 Am. & Eng. Ency. Law (1st ed. 1891), 926; Gunter v. Geary, 1 Cal. 462, 467, per Bennett, J.

"As the people of a community have a right, of which nothing but an act of assembly can deprive them, to pure, untainted, uncontaminated, inoffensive air, it follows that whatever of itself deprives them or interferes with their enjoyment of such right, necessarily is, of itself, a public nuisance and indictable;" and if the people of the neighborhood or the public are affested in contradistinction to a few people, it is a public nuisance. State v. Luce, 9 Houst.. (Del.), 396, 398, 32 Atl. 1076, per Comegys, Ch. J. (a case of noxious, etc., smells from a fish factory).

"A public nuisance is one that injures the citizens generally, who may be so circumstanced as to come within its influence." Nolan v. New Britain, 69 Conn. 668, 678 (a case of pollution of watercourse.)

"A thing which is in its nature injurious and a source of constant danger in a populous place, may constitute a public nuisance." King v. Davenport, 98 Ill. 305, 315, 38 Am. Rep. 89.

great many persons, the injury being to the individual property of each. A nuisance is public when it affects the rights enjoyed by

"A nuisance is public if it annoys such part of the public as necessarily comes in contact with it." Kissel v. Lewis, 156 Ind. 233, 240, 59 N. E. 278, per Dowling, C. J.

"'Every place where a public statute is openly, publicly, repeatedly, consistently and intentionally violated, is a public nuisance.'" State v. Ohio Oil Co., 150 Ind. 21, 37, 49 N. E. 809, 47 L. R. A. 627, quoting from State v. Crawford, 28 Kan. 726.

"All the citizens of the State need not be injured to constitute a public nuisance. It is sufficient if the health of any and all persons in the neighborhood generally is injured." Moses v. State, 58 Ind. 185.

"A nuisance is public if it annoy such part of the public as necessarily come in contact with it." "Thus, anything offensive to the sight, smell, or hearing, erected or carried on in a public place where the people dwell or pass, or have a right to pass, to their annoyance, is a nuisance at common law." Hackney v. The State, 8 Ind. 494, 495.

"Nuisances which affect a place where the people have a legal right to go and where the members thereof congregate, or where they are likely to come within its influence, are public nuisances." Burlington v. Stockwell, 5 Kan. App. 569, 47 Pac. 988.

"A public or common nuisance is such an inconvenience, or troublesome offense, as annoys the whole community in general and not some particular person." Veazie v. Dwinel, 50 Me. 479, 481, 482, per Rice, J., citing 4 Bl. Comm. 166, 167, (a case of obstruction of "floatable stream").

"A common or public nuisance is that which affects the people and is a violation of a public right either by a direct encroachment upon public property or by doing some act which tends to a common injury or by the omitting of that which the common good requires and which it is the duty of a person to do. Public nuisances are founded upon wrongs that arise from the unreasonable, unwarrantable or unlawful use of property, or from improper, indecent or unlawful conduct, working an obstruction or injury to the public and producing material annoyance, inconvenience and discomfort founded upon a wrong, it is indictable and punishable as a misdemeanor." Bohan v. Port Jervis G. L. Co., 122 N. Y. 18, 32, per Haight, J., in dissenting opinion.

Nuisance is "an injury to the *jus publicum*, or common rights of the public to navigate the waters. People v. Vanderbilt, 26 N. Y. 287, 293, per Selden, J. (a case of a crib or pier sunk in a public river), quoted in The Idlewild, 64 Fed. 603, 605, per Shipman, C. J. (a case of a wharf beyond bulkhead line).

"To render an act indictable as a nuisance, it is necessary that it should be an offense so inconvenient and troublesome as to annoy the whole community and not merely particular persons." State v. Baldwin, 18 N. C. (1 Dev. & Batt's L.) 195, 197, per Gaston, J.

"Nuisance is public or common, where the whole community is an-

citizens as part of the public, as the right of navigating a river, or traveling on a public highway; rights to which every citizen is entitled.[17]

noyed or inconvenienced by the offensive acts, as where one obstructs a highway or carries on a trade that fills the air with noxious and offensive fumes." Village of Cardington v. Fredericks, 46 Ohio St. 442, 446, 21 N. E. 766, per Spear, J. (a case of obstruction of street), quoting Cochran's Law Lex. 192.

"A nuisance presupposes something noisome to the neighborhood, or dangerous to the people in their common and legitimate walks, or obstructing common convenience." Jarvis v. Pinckney, 3 Hill (S. C.), 447, 459, per Richardson, J. (a case of destruction of a vessel and cargo).

"A common nuisance affects the people at large, and is an offence against the State, but an action may be brought in his own name by anyone who suffers damage peculiar in kind or degree beyond what is common to him and to others." Powell v. Bentley & Gernig Fur. Co., 34 W. Va. 804, 807, 12 L. R. A. 53, 12 S. E. 1085, per Hall, J.

"It is not necessary that a public nuisance should be injurious to health; if there be smells offensive to the senses, that is enough, as the neighborhood has a right to fresh and pure air." Rex v. Neil, 2 Carr. & P. 485, 690, per Abbott, C. J. (a case of smells from defendant's manufactory).

Where a nuisance is confined to a few inhabitants of a particular place, an indictment will not be sustained, it being at the most only a private nuisance. King v. Lloyd, 4 Esp. 200. In this case the alleged nuisance extended only to attorneys who were the inhabitants of three numbers only of Clifford's Inn.

"I conceive that, to constitute a public nuisance, the thing must be such as, in its nature or its consequence, is a nuisance—an injury or a damage to all persons who come within the sphere of its operation, though it may be so in a greater degree to some than it is to others . . . It does not follow, because a thing complained of is a nuisance to several individuals, that, therefore, it is a public nuisance." Soltau v. De Held, 2 Simons, N. S. 133, 142, 144, per the Vice Chancellor.

17. King v. Morris & Essex Rd. Co., 18 N. J. Eq. 397, 399, per The Chancellor. See, also, citations in last preceding note herein.

"'All acts put forth by men, which tend directly to create evil consequences to the community at large, may be deemed nuisances, where they are of such magnitude as to require the interposition of courts.'" Mohr v. Gault, 10 Wis. 513, 517, 78 Am. Dec. 687, per Dixon, C. J., quoting 2 Bishop, § 848.

"A public nuisance is a violation of a public right either by a direct encroachment upon public rights or property, or by doing some act which tends to a common injury or by omitting to do some act which the common good requires, and which it is the duty of a person to do, and the omission to do which results injuriously to the public." United States v.

§ 6. Hawkin's and Blackstone's definitions—Public nuisance. —"A Common Nuisance may be defined to be an Offense against the Publick, either by doing a Thing which tends to the Annoyance of all the King's Subjects, or by neglecting to do a Thing which the Common Good requires."[18] Public or common nuisances are those "which affect the public and are an annoyance to all the king's subjects."[19] Common nuisances are a species of offenses against public order and economical regimen of the State; being either the doing of a thing to the annoyance of all the King's subjects, or the neglecting to do a thing which the common good requires. . . . Common nuisances are such inconvenience or troublesome offenses as annoy the whole community in general and not merely some particular person."[20]

Debs, 64 Fed. 724, 740, quoting Wood on Nuis., p. 38, per Woods, C. J. (a case of power of equity to restrain public nuisance). See, also, *Ex parte* Foote, 70 Ark. 12, 15, 91 Am. St. Rep. 63, 65 S. W. 706, per Battle, J., (a question of validity of ordinance prohibiting keeping of stallion or jack).

"A common nuisance is an act which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all her majesty's subjects." Queen v. Price, L. R. 12, Q. B. D. 247, 256, per Stephen, J., (a case of burning a dead body).

18. Hawkins P. C. Book, 1 Ch. 75, p. 197.

19. 3 Bl. Comm. * 216.

20. 4 Bl. Comm. * 167; Kinney v. Koopman & Gerdes, 116 Ala. 310, 318, 22 So. 593, 67 Am. St. Rep. 119, 37 L. R. A. 497, per Coleman, J. (a case of storing of gunpowder). State v. Mayor & Aldermen of Mobile, 5 Port. (Ala.), 279, 311, 30 Am. Dec. 564, per Collier, J. (an obstruction of highway by erection of market house, a like definition, but citing Bacon); Wylie v. Elwood, 134 Ill. 281, 286, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726, per Magruder, J. (a case of a coal shed); Earp v. Lee, 71 Ill. 193, 194, per Walker, J. (a case of abatement of nuisance); Moses v. State, 58 Ind. 185, 186 (an annoyance to all the king's subjects is a public nuisance by common law); Ohio & Mississippi Ry. Co. v. Simon, 40 Ind. 278, 285, per Downey, J. (a case of noise and smells from cattle pens); Trustees Cincinnati So. Ry. Co. v. Commonwealth, 3 Ky. L. Rep. 639, 640, per Lewis, C. J. (a case of leaving a hand car upon railroad); Veazie v. Dwinel, 50 Me. 479, 482, per Rice, J. (a case of obstruction of river though not navigable but a "floatable stream"); Ellis v. Kansas City St. J. & C. B. R. Co., 63 Mo. 131, 135, per Norton, J. (alleged nuisance was animal's carcass); Hayden v. Tucker, 37 Mo. 214, 221, per Wagner, J. (holding that the keeping and standing of jacks and stallions within the immediate view of a private dwelling

§ 7. Statutory or Code definitions—Public nuisance.—"A public nuisance is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal."[21] Another definition is: "A public nuisance is one which damages all persons which come within the sphere of its influence, though it may vary in its effect upon individuals."[22] Again: "A public nuisance is a crime against the order and economy of the State, and consists in unlawfully doing an act, or omitting to perform a duty, which act or

is a nuisance); State v. Godwinsville & P. M. Road Co., 49 N. J. L. 266, 270, 9 Cent. 128, 60 Am. St. Rep. 611, 10 Atl. 666 (citing also Angell on Highways, § 222); People v. Corporation of Albany, 11 Wend. (N. Y.), 539, 543, 27 Am. Dec. 95, per Nelson, J. (applied to a case of a corporation neglecting to do what the common good requires); Lancaster Turnpike Co. v. Rogers, 2 Pa. 114, 115, 44 Am. Dec. 179, per Burnside, J. (citing also 2 Roll. Ab. 83, 5 Wils. Bacon, 146, [7 id. 223]); Jarvis v. Pinckney, 3 Hill (S. C.), 447, 459, per Richardson, J. (a case of destruction of a vessel and cargo); United States v. Debs, 64 Fed. 724, 740, per Woods, C. J. (a case of power of equity to restrain public nuisance); Attorney General v. Tod Heatly (1897), 1 Ch. 560, 566, 66 L. J. Ch. N. S. 275, 76 Law T. Rep. N. S. 174, 176, per Lindley, J. J., case reverses 75 Law T. Rep. 452.

21. *California* Civ. Code. § 3480; Penal Code, §§ 370, 371. "Anything which is 'an obstruction to the free use of property so as to interfere with the comfortable enjoyment of life and property by an entire community or neighborhood or any considerable number of persons,' is a public nuisance." People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374, quoted in State v. Ohio Oil Co., 150 Ind. 21, 37, 49 N. E. 809, 47 L. R. A. 627, per McCabe, J.

Idaho Codes 1901 (Civ. Code), § 2965.

Minnesota Stat. 1894, § 6614 (given under next note).

Montana Civ. Code (Codes 1895), § 4551.

North Dakota Rev. Codes, 1899 (Civ. Code), § 5057.

South Dakota Grantham's Stat. 1901 (Civ. Code), § 5885; Rev. Codes, 1903, p. 861 (Civ. Code), § 2394.

Washington.—"A public nuisance is one which offects equally the rights of an entire community or neighborhood although the extent of the damages may be unequal." Ballinger's Annot. Codes & Stat. 1897, § 3084; § 3085 enumerates public nuisances, see, also, § 3096.

22. Ga. Civ. Code, 1895, §§ 3858, 3859; see 3 Ga. Civ. Code, § 641, p. 169; Savannah F. & W. R. Co. v. Parish, 117 Ga. 893, 14 Am. Neg. Rep. 540, 45 S. E. 280. See Hill v. McBurney Oil & F. Co., 112 Ga. 788, 793, 38 S. E. 42, 52 L. R. A. 398, Ga. Civ. Code, § 3861.

omission: 1. Annoys, injures or endangers the comfort, repose, health or safety of any considerable number of persons; or, 2. Offends public decency; or, 3. Unlawfully interferes with, obstructs, or tends to obstruct, or render dangerous for passage, a lake, or a navigable river, bay, stream, canal or basin, or a stream, creek or other body of water which has been dredged or cleared at public expense, or a public park, square, street or highway; or, 4. In any way renders a considerable number of persons insecure in life, or in the use of property." [23]

23. *New York* Penal Code (Cook's Crim. & Pen. Codes Annot. 1905), § 385; 2 Birdseye's Rev. Stat., Codes, etc. (3d ed. 1901), p. 2556, cited in Tinker v. New York, Ontario & W. R. Co., 157 N. Y. 312, 318, 51 N. E. 1031 (obstruction of highway).

§ 320 Penal Code provides that "an act which affects a considerable number of persons, in either of the ways specified in the last section, is not less a nuisance because the extent of the damage is unequal."

See, also, *Minnesota* Stat. 1894, §§ 6613, 6614; Penal Code, §§ 319, 320.

Porto Rico Pen. Code, § 329, Rev. Stat. and Codes 1902, p. 551, gives as a definition of a public nuisance the same definition as that given in the text herein in the section defining nuisance, except that after the words "life or property" and before the words "or unlawfully obstructs," it reads "by an entire community or neighborhood, or by any considerable number of persons," and "is a public nuisance" the last words are: "is a public nuisance."

Utah Rev. Stat. 1898, § 4275, subdv. "I," differs in that the words at the end are "safety of three or more persons;" and it reads after the word "passage" in subdv. "3"—"any lake, stream, canal, basin or any public park, square, street or highway, or 4 in any way renders three or more persons unsecure in life or the use of property."

See, also, Utah Comp. Laws, 1888, § 4556; North Point C. I. Co. v. Utah & S. L. Co., 16 Utah, 246, 272, 67 Am. St. Rep. 607, 40 L. R. A. 851, 52 Pac. 168, 8 Am. & Eng. Corp. Cas. N. S. 98, where it is also said that a nuisance may be offensive to the sense of smell, sight or hearing; 16 Utah, p. 271; People v. Burthelsen, 14 Utah, 258, 47 Pac. 87, which holds that the above statute is not repealed by one which relates merely to befouling waters of any stream used for domestic purposes, even though an act under the later law might be a nuisance.

As to States having a similar general definition as subdv. 3 in text, see § 4 herein; Statutory or code definition—nuisance.

"Whoever erects, continues, uses, or maintains, any building, structure, or place for the exercise of any trade, employment, or business, or for the keeping or feeding of any animal, which, by occasioning noxious exhalations, or noisome or offensive smells, becomes injurious to the health, comfort, or property of individuals, or the public, or causes or

§ 8. **Private nuisance defined.**—A private nuisance is one which affects a private right not common to the public, or which causes special injury to person or property of a single person or a determinate number of persons.[24]

§ 9. **Blackstone's definition—Private nuisance.**—Private nuisances are "anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another."[25] It is said in a New

suffers any offal, filth, or noisome substance, to be collected, or to remain in any place, to the damage or prejudice of others, or the public, or obstructs or impedes, without legal authority, the passage of any navigable river, harbor, or collection of water, or corrupts, or renders unwholesome or impure, any water-course, stream, or water, or unlawfully diverts any such water-course from its natural course or state, to the injury or prejudice of others, or obstructs or incumbers, by fences, buildings, structures, or otherwise, any public ground, or highway, or any street or alley of any municipal corporation, shall be fined not more than five hundred dollars." 3 Bates Annot. *Ohio* Stat. (4th ed., 1787-1904), § 6921.

Under Ballinger's Annot. Codes & Stat. *Washington*, 1897, § 7310, fine is five hundred dollars for public nuisance.

The *Illinois* statute enumerates what are public nuisances and provides for the punishment thereof. Hurd's Rev. Stat. 1903, p. 657, § 221 (Crim. Code).

24. Hundley v. Harrison, 123 Ala. 292, 296, 26 So. 294, per Heralson, J., citing 16 Am. & Eng. Ency. Law (1st ed., 1891), 926; Gunter v. Geary, 1 Cal. 462, 467, per Bennett, J.; Burlington v. Stockwell, 5 Kan. App. 569, 47 Pac. 988; a private nuisance is not necessarily founded upon a wrong. "It is founded upon injuries that result from the violation of private rights and produce damage to but one or few persons." Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 33, 25 N. E. 246, 33 N. Y. St. R. 246, per Haight, J., in dissenting opinion.

"A private nuisance affects one or more as private citizens and not as part of the public, and is ground for a civil suit only." Powell v. Bentley & Gerwig Fur. Co., 34 W. Va. 804, 807, 12 L. R. A. 53, 12 S. E. 1085, per Holt, J.

"Whatever annoys or does damage to another is a private nuisance." And. L. Dict. 717, quoted in Payne v. Kansas & A. Val. R. Co., 46 Fed. 546, 554, per Parker, J. (a question of equity jurisdiction). See, further, Village of Codington v. Fredericks, 46 Ohio St. 442, 446, 21 N. E. 766, per Spear, J.

See, also, §§ 13, 14 herein as to distinction between public and private nuisances.

25. 3 Bl. Comm. * 216; Cartwright v. Bear River & A. W. & M. Co., 30 Cal. 573, 576, per Rhodes, J. (a case of jurisdiction to abate nuisance); Bonner v. Wellborn, 7 Ga. 296, 311,

York case that "Blackstone defines a nuisance as being anything to the hurt, or annoyance of another. By hurt, or annoyance here is meant, not a physical injury necessarily, but an injury to the owner or possessor of premises, as respects his dealings with or his mode of enjoying them.[26]

per Nisbet, J. (an injury to medicinal Springs); North Shore St. Ry. Co. v. Payne, 192 Ill. 239, 245, 61 N. E. 467, per Cartwright, J. (a street railway power house); Laflin & Rand Powder Co. v. Tearney, 131 Ill. 322, 326, 19 Am. St. Rep. 34, 23 N. E. 389, 7 L. R. A. 262, per Magruder, J. (a case of storage of gunpowder); Barnes v. Hathorn, 54 Me. 124, 126, 127 (tomb erected on one's own land); Ellis v. Kansas City, St. J. & C. B. R. Co., 63 Mo. 131, 135, per Norton, J. (alleged nuisance was animal's carcass); Ohio & Mississippi Ry. Co. v. Simon, 40 Ind. 278, 285, per Downey, J. (a case of noise and smells from cattle pens); Hayden v. Tucker, 37 Mo. 214, 221, per Wagner, J. (keeping and standing of jacks and stallions); Kavanaugh v. Barber, 131 N. Y. 211, 213, 43 N. Y. St. R. 283, 15 L. R. A. 689, 30 N. E. 235, per Andrews, J. (fumes from asphalt factory); Heeg v. Licht, 80 N. Y. 579, 582, 36 Am. Rep. 654, per Miller, J. (keeping gunpowder); Veazie v. Dwinel, 50 Me. 479, 482, per Rice, J. (obstruction of river, not navigable but "floatable stream"); Cropsey v. Murphy, 1 Hilt (N. Y.), 126, 127, per Brady, J. (pot boiling establishment); Burdett v. Swensen, 17 Tex. 489, 502, 67 Am. Dec. 665, per Wheeler, J.; Payne v. Kansas & A. Val. R. Co., 46 Fed. 546, 554, per Parker, J. (a question of equity jurisdiction).

"In commenting on this definition, Judge Cooley says: 'An actionable nuisance may, therefore, be said to be anything wrongfully done or permitted, which injures or annoys another in the enjoyment of his legal rights.' Cooley on Torts (2d ed.), 670." Paddock v. Somers, 102 Mo. 226, 237, 14 S. W. 746, 10 L. R. A. 254.

Similar definitions are as follows: "Anything unlawfully done to the hurt or annoyance of the person as well as to the lands, tenements and hereditaments of another." Swords v. Edgar, 59 N. Y. 28, 34, 7 N. Y. Supp. 158, 26 N. Y. St. R. 42; Timlin v. Standard Oil Co., 54 Hun (N. Y.), 44, 26 N. Y. St. Rep. 42, 7 N. Y. Supp. 158 (case reversed 126 N. Y. 514, 37 N. Y. St. R. 906, 27 N. E. 786).

"Anything done to the hurt or annoyance of the lands, tenements or hereditaments of another," quoted in Campbell v. Seamen, 2 T. & C. (N. Y.), 231, 235, per Potter, J., citing Crabbe on Real Property, § 1067, and also declaring that "This is too general a definition to be established as a rule for all cases or which will authorize the bringing of an action in every case coming within the strict letter of the definition."

26. Rowland v. Miller, 15 N. Y. Supp. 701, 702, per McAdam, J. (a case of undertaker establishments). See Eller v. Koehler, 68 Ohio St. 51, 67 N. E. 89, 12 Am. Neg. Rep. 659, per curiam, as to what is too literal an interpretation of this definition.

§ 10. **Statutory or Code definitions—Private nuisance.**—The codes of five States provide that every nuisance not included in the definition of a public nuisance under their codes is private.[27] A private nuisance is also defined as "One limited in its injurious effects to one or a few individuals."[28]

§ 11. **Nuisance defined with relation to the maxim sic utere, etc.**[29]—The unauthorized or unreasonable use of, or the neglect to properly and reasonably use, one's own property, to the detriment, hurt, annoyance, discomfort, injury, or damage of another, in his property or legal rights, or of the public, is a nuisance.[30] A use

27. *California* Civ. Code, § 3481. *Idaho* Codes 1901 (Civ. Code), § 2966. *Montana* Civ. Code (Codes 1895), § 4552. *North Dakota* Rev. Codes, 1899 (Civ. Code), § 5058. *South Dakota* Stat. 1901 (Grantham's) (Civ. Code), § 5886; Rev. Codes, 1903, p. 861 (Civ. Code), § 2395. *Washington.*— Ballinger's Annot. Codes & Stat. 1897, § 3087, see id. §§ 3093, 5661.

See, also, *California* Code Civ. Proc., last clause, § 731.

Indiana.—Horner's Rev. Stat. 1901, § 289, last clause.

Georgia Civ. Code, 1895, §§ 3858, 3859; also *Nevada* Comp. Laws (Cutting's Annot.), 1900, § 3346, last clause.

28. 2 Ga. Civ. Code, 1895, § 3858.

29. See §§ 15 *et seq.* herein.

30. "A nuisance is the unlawful use of one's own property working an injury to the right of another or of the public, and producing such inconvenience, discomfort, or hurt that the law will presume a subsequent damage." State of Iowa v. Beardsley, 108 Iowa, 396, 405, 406, 79 N. W. 138, per Granger, J., citing Woods Nuis. 1, 16 Am. & Eng. Ency. Law (1st ed.), 923.

"A nuisance, in legal phraseology, is a term applied to that class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his property, real or personal. Every enjoyment by him of his own property, which violates the rights of another, is, in an essential degree, a nuisance." George v. The Wabash Western Ry. Co., 40 Mo. App. 433, 444, per Smith, P. J. (a case of flooding land and continuing nuisance); citing Wood's Nuis. 1, 2. See, also, Laflin & Rand Powder Co. v. Tearney, 131 Ill. 322, 326, 19 Am. St. Rep. 34, 23 N. E. 389, 7 L. R. A. 262, per Magruder, J. (a case of storage of gunpowder); Farrell v. Cook, 16 Neb. 483, 485, 20 N. W. 720, 49 Am. Rep. 721, per Maxwell, J. (a case of standing stallions and jacks); Bly v. Edison Electric Illuminating Co., 172 N. Y. 1, 9, 58 L. R. A. 500, 64 N. E. 745 ("a nuisance is an unreasonable, unwarrantable, or unlawful use of one's own property to the annoyance, inconvenience, discom-

made by one of his own property which works an irreparable injury to another's property, or which deprives his neighbor of the reasonable and comfortable enjoyment and use of his property, or which violates the unwritten but accepted law of decency, or which endanger or render insecure the life and health of his neighbor, is a nuisance.[31] So every enjoyment by one of his own property which conflicts with the rights of another in an essential degree is a nuisance.[32] Another definition is: A private nuisance is "where one so uses his property as to damage another's or disturb his quiet enjoyment of it."[33] A nuisance is also defined as "a tort. It is 'the use of one's own property which involves injury to the property, or other right, or interest of the neighborhood.'"[34] So where anything is constructed on a person's premises, which of itself, or by its intended use, directly injures a neighbor in the proper use and enjoyment of his property, it is a nuisance.[35]

fort, or damage of another"); Heeg v. Licht, 80 N. Y. 579, 582, 36 Am. Rep. 654, per Miller, J. (a case of keeping gunpowder); Rowland v. Miller, 15 N. Y. Supp. 701, 702, per McAdam, J. (an undertaking establishment); Henson v. Beckwith, 20 R. I. 165, 167, 78 Am. St. Rep. 847, 37 Atl. 702, 38 L. R. A. 716, per Stiness, J. (a case of lessor and lessee).

The principle embodied in the maxim, *sec utere*, etc., applies to the public in at least as full force as to individuals. Egerton v. Brownlow, 4 H. L. Cas. 195, cited in Broom's Leg. Max. (7th Amer. ed.), 1874, p. 364 * 366.

"Nuisances to dwelling houses are all acts done by another, from without, which render the enjoyment of life within the house uncomfortable, whether by infecting the air with noisome smells, or with gases injurious to health, or by the exercise of a trade by machinery, which produces continued noises in the adjoining tenement." 2 Greenleaf on Ev., § 466, quoted in Aldrich v. Howard, 8 R. I. 246.

31. Lowe v. Prospect Hill Cemetery Ass'n, 58 Neb. 94, 107, 46 L. R. A. 237, 78 N. W. 488, per Ragan, C.

32. Louisville & N. R. R. Co. v. Commonwealth (Super. Ct.), 16 Ky. L. Rep. 347.

33. Village of Cardington v. Fredericks, 46 Ohio St. 442, 446, 21 N. E. 766, per Spear, J. (a case of obstruction of street), citing Cockran's Law Lex. 192.

34. Merrill v. City of St. Louis, 83 Mo. 244, 255, 53 Am. Rep. 576, per Philips, C. (a case of liability of married woman), quoting 1 Hill on Torts, 577.

35. Hundley v. Harrison, 123 Ala. 292, 297, 26 So. 294, per Haralson, J.; Grady v. Wolsner, 46 Ala. 381, 382, 7 Am. Rep. 593, per Safford, J.

§ 12. **Nuisance per se defined.**—A nuisance *per se*, as the term implies, is a nuisance in itself, and which, therefore, cannot be so conducted or maintained as to be lawfully carried on or permitted to exist. Such a nuisance is a disorderly house, or an obstruction to a highway or to a navigable stream.[36] Again, "Nuisances *per se* have been defined to be such things as are nuisances at all times and under all circumstances, irrespective of location or surroundings."[37]

36. Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 420, 421, 37 L. R. A. 381, 47 N. E. 2, 62 Am. St. Rep. 532, per Howard, J.

37. Hundley v. Harrison, 123 Ala. 292, 296, 26 So. 294, per Haralson, J., quoting 16 Am. & Eng. Ency. Law (1st ed), 937, citing 1 Wood on Nuis., §§ 24, 27.

CHAPTER II.

Classification, Nature and Character.

Section 13. Difficult to determine whether nuisance is public or private; may be both.
14. Extent of difference between public and private nuisances.
15. Two kinds of public nuisances.
16. General classification and distinction with relation to nuisances *per se*.
17. Nuisance distinguished from trespass.
18. Distinction between negligence and nuisance.
19. Nuisance a question of degree—Difficult to define amount of annoyance.
20. Injury must not be fanciful or imaginative.
21. Trifling inconvenience or discomfort.
22. Substantial, tangible, material and appreciable injury.
23. Acts of several persons may constitute a nuisance.
24. General nature and character of nuisance as affecting remedy or relief.

§ 13. Difficult to determine whether nuisance is public or private; may be both.—Nuisances are public and private. It is often difficult to determine to which class the alleged nuisance belongs. In many cases a nuisance may be at the same time both public and private, public in its general effect upon the public and private as to those who suffer a special or particular damage therefrom apart from the common injury.[1] It is declared, however, that the

1. Aldrich v. City of Minneapolis, 52 Minn. 164, 171, 53 N. W. 1072, 1073, per Mitchell, J.; Hayden v. Tucker, 37 Mo. 214, 221, per Wagner, J.

The doctrine now is that a nuisance may be at the same time both public and private. Wylie v. Elwood, 134 Ill. 281, 287, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726, per Magruder, J.

A public nuisance may also be a private nuisance. Kissel v. Lewis, 156 Ind. 233, 240, 59 N. E. 278, per Dowling, C. J.

A nuisance may be both public and private. Haggart v. Stehlin, 137 Ind. 43, 51, per McCabe, J.

A nuisance may at the same time be both public and private and a recovery may be had by one who has suffered special damage by reason of

distinction between a public and a private nuisance is plain and palpable; the first being an injury done which affects the whole community and therefore not actionable; the second being an injury to property, privileges or health of individuals of that community and therefore actionable.[2]

§ 14. **Extent of difference between public and private nuisances.**—There is no difference in principle between a condition which is called a private and one which is called a public nuisance, the constituents of both are the same. It is not the number who suffer which constitutes an exclusive test, but the nature of the right affected which determines whether a private or public action will lie; for the fact that numbers are injured does not make the nuisance such a common one as to exclude redress by private remedy from a single individual. Nor is there in this respect any difference in the nature or character of the thing itself; that which is a public nuisance, and which annoys the public generally or invades its rights, constitutes a private nuisance where an individual, or class of individuals, sustains as such, a special injury as distinguished from that sustained by the public, and redress in such case exists by way of a private remedy. If the injury is common to the public and special to none redress must be by criminal prosecution in behalf of the public.[3] A nuisance, such as

sickness of himself or family. Savannah F. & W. R. Co. v. Parish, 117 Ga. 893, 45 S. E. 280, 14 Am. Neg. Rep. 540, 542.

"Although a nuisance be a public one, yet it is private also, if an individual sustain a special injury thereby." Village of Cardington v. Fredericks, 46 Ohio St. 442, 446, 21 N. E. 766, per Spear, J.

See, also, Kavanagh v. Barber, 131 N. Y. 211, 213, 214, 43 N. Y. St. R. 283, 15 L. R. A. 689, 30 N. E. 235; Simpson v. Smith, 8 Sim. 272, per Bruce, V. C. See, further, section herein as to special damage and private remedy.

2. Lansing v. Smith, 4 Wend. (N. Y.), 9, 30, per Allen, Senator.

3. "The difference between a public nuisance and a private nuisance, does not consist in any difference in the nature or character of the thing itself. It is public because of the danger to the public. It is private only because the individual as distinguished from the public has been or may be injured. Public nuisances are indictable. Private nuisances are actionable, either for their abatement, or for damages, or both . . . Whatever constitutes a public nuisance as to the public will constitute a private nuisance, if established so as to

an unreasonable or wanton obstruction of a navigable stream, a public highway, may be public in its general effect upon the public, and at the same time private as to those individuals who suffer a special and particular damage therefrom; distinct and apart from

have the same effect upon the premises or health of a private person as it would have upon the public, if established in a city, or highway. The constituents and definitions of a nuisance, whether public or private, are the same." Kinney v. Koopman & Gerdes, 116 Ala. 310, 319, 320, 323, 22 So. 593, 37 L. R. A. 497, 67 Am. St. Rep. 119, per Coleman, J.

"A nuisance is denominated private because it injures only a particular individual or class of individuals, and can therefore be abated only by him who suffers from it. But a nuisance is common because it is an injury to the whole community. Every person in the community is aggrieved, and consequently every person has the right to abate the nuisance." Gunter v. Geary, 1 Cal. 462, 467, per Bennett, J.

If the annoyance is one that is common to the public generally, then it is a public nuisance. The test is not the number of persons annoyed, but the possibility of annoyance to the public by the invasion of its rights. Nolan v. New Britain, 69 Conn. 668, 678, 38 Atl. 703, per Andrews, C. J. (a case of pollution of watercourse), citing Stephens Dig. Cr. Law, 120; Westcott v. Middleton, 43 N. J. Eq. 478; Wood on Nuisances, 76.

A private nuisance is not the subject of public prosecution, but of a private action. Earl v. Lee, 71 Ill. 193, 194.

A nuisance will be private to anyone who in his person or property sustains any special injury different from that of the public. Kissel v. Lewis, 156 Ind. 233, 240, 59 N. E. 278, per Dowling, C. J.

Number of persons annoyed does not determine character of nuisance as public or private, but the possibility of annoyance to the public by an invasion of its rights furnishes the test. Burlington v. Stockwell, 5 Kan. App. 569, 47 Pac. 988.

It is not the number who suffer, but the nature of the right affected which determines whether a public or private action will lie. Aldrich v. City of Minneapolis, 52 Minn. 164, 172, 53 N. W. 1072, 1074, per Mitchell, J. See, also, Carleton v. Rugg, 149 Mass. 550, 556, 5 L. R. A. 193, 22 N. E. 55, 14 Am. St. Rep. 550; Brunner v. Schaffer, 11 Pa. Co. Ct. Rep. 550; Commonwealth v. Rush (Pa.), 11 Lanc. L. Rev. 97. See, also, as to number of other persons sustaining like injury, not precluding private remedy and not being the test, Fisher v. Zumwalt, 128 Cal. 493, 496, 61 Pac. 82, per Cooper, C.; Siegfried v. Hays, 81 Ky. 377, 380, 50 Am. Rep. 167; Savannah F. & W. R. Co. v. Parish, 117 Ga. 893, 45 S. E. 280, 14 Am. Neg. Rep. 540, 542; Wylie v. Elwood, 134 Ill. 281, 287, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726, per Magruder, J.; Crane Co. v. Stammers, 83 Ill. App. 329; Kissel v. Lewis, 156 Ind. 233, 240, 59 N. E. 278, per Dowling, C. J.; Percival v. Yousling, 120 Iowa, 451,

the common injury.[4] So when one does an act which "operates injuriously to another it will be a private nuisance for which he shall have his action for redress; but if in addition thereto it is detrimental to the whole neighborhood, or to the community at large, it is also a public nuisance and the subject of a criminal as well as civil prosecution. But where a person sustains some particular damage beyond the rest of the community, by a public nuisance, he may maintain his private action and seek redress in the courts."[5] If the nuisance merely affects the rights enjoyed by citizens as part of the public, as in case of the right to travel the public highway, the remedy is by proceedings in the name of the state, even though only one person has been prejudiced. If the right interfered with is a private one, as where one suffers in person or estate on account of the nuisance, an action will lie without regard to the number who have suffered.[6] And where a bill is filed to abate a nuisance as dangerous to the public health,[7] the relator must show that the situation or practice complained of amounts, without the

94 N. W. 913; Carleton v. Rugg, 149 Mass. 550, 556, 14 Am. St. Rep. 550, 5 L. R. A. 193, 22 N. E. 55; Schoen v. Kansas City, 65 Mo. App. 134; Francis v. Schoelkopf, 53 N. Y. 152; Lansing v. Smith, 4 Wend. (N. Y.), 9, 25, 27 Am. Dec. 89, per Walforth, C.; Morris v. Graham, 16 Wash. 343, 345, 47 Pac. 752, 58 Am. St. Rep. 33, per Gordon, J.; Spokane Mill Co. v. Post, 50 Fed. 429, 432, per Beatty, D. J. See, also, section herein as to special damages and private remedy.

"There is no difference in principle between a condition which is called a private and one called a public nuisance. One is where the danger is to the individual, the other when it is to a number of individuals or the entire public." Wilcox v. Hines, 100 Tenn. (16 Pick.), 538, 559, 46 S. W. 297, 66 Am. St. Rep. 770, per Wilkes, J.

"Where the acts which create the public nuisance cause also private and special injury to the plaintiff, an action at law will lie." Walker v. Shepardson, 2 Wis. 384, 396, 60 Am. Dec. 423, per Whiton, C. J. See, further, as to distinction between public and private nuisance, Wesson v. Washburn Iron Co., 13 Allen (Mass.), 95, 100-103, 90 Am. Dec. 181, per Bigelow, C. J.

4. Page v. Mille Lacs Lumber Co., 53 Minn. 492, 55 N. W. 608, judgment vacated on rehearing because of nonjurisdiction, 55 N. W. 1119.

5. Hayden v. Tucker, 37 Mo. 214, 221, per Wagner, J.

6. Aldrich v. City of Minneapolis, 52 Minn. 164, 172, 53 N. W. 1072, 1074, per Mitchell, J.

7. Under N. J. Act, March 31, 1887, §§ 28, 29 (P. L., p. 93).

aid of other similar practices or situations, to a public as distinguished from a private nuisance, that it must affect a considerable number of persons and must be such as would be indictable at law.[8] Again, where two parties desire to exercise a public and general right, and one of them recklessly and carelessly uses such right to the prejudice of the other, without affecting the general public, the injury is a private and not a public wrong, and an information on behalf of the State will not be sustained.[9]

§ 15. **Two kinds of public nuisances.**—There are two kinds of public nuisances. One is that class of aggravated wrongs or injuries which affect the morality of mankind, and are in derogation of public morals and decency and being *malum in se*, are nuisances irrespective of their location and results. The other is that class of acts, exercise of occupations or trades, and use of property which become nuisances by reason of their location or surroundings. To constitute a nuisance in the latter class, the act or thing complained of must be in a public place or so extensive in its consequences as to have a common effect upon many, as distinguished from a few. Where it is in a city or town, where many are congregated and have a right to be, and produces material annoyance, inconvenience, discomfort or injury to the residents in the vicinity, it is a public nuisance of the latter class.[10]

§ 16. **General classification and distinction with relation to nuisances per se.**—Nuisances may be thus classified: First, those which in their nature are nuisances *per se* or are so denounced by the common law or by statute; second, those which in their nature are not nuisances but may become so by reason of their locality, surroundings or the manner in which they may be conducted, managed, etc.; third, those which in their nature may be nuisances, but as to which there may be honest differences of opinion in impartial minds.[11] Some things may be nuisances *per se* under all

8. State Board of Health of Hackensack v. Freeholders of Bergen, 46 N. J. Eq. 173, 18 Atl. 465.

9. Atty. Genl. v. Evart Booming Co., 34 Mich. 462.

10. *Ex parte* Foote, 70 Ark. 12, 15. 91 Am. St. Rep. 63, 65, S. W. 706, per Battle, J.

11. City of Carthage v. Munsell, 203 Ill. 474, 478, 67 N. E. 831, per

circumstances as to all persons; other things are nuisances only under certain circumstances and as to certain persons. A slaughter-house may be a nuisance as to the owner's neighbors but none at all as to his employes in the business.[12] Not every annoyance to the comfort and enjoyment of living is a nuisance *per se*.[13] "The distinction between nuisances which are such *per se*, and those uses which become such by reason of the character of the use or the place; have also been recognized. . . . unless the thing of itself because of its inherent qualities, without complement, is productive of injury, or by reason of the manner of its use or exposure, threatens or is dangerous to life or property, it cannot be said to be a nuisance *per se* at common law. If an occupation be lawful and by care and precaution it can be conducted without danger or inconvenience to another, the occupation is not *per se* a nuisance, and if such an occupation or business becomes a nuisance it is because of a want of proper care or precaution. . . . The question of care and diligence does not arise in cases of damages resulting from nuisance *per se*, because the thing itself was unlawful."[14] The difference between a nuisance *per se* and a lawful business carried on so as to become a nuisance lies rather in the proof than in the remedy.[15] "A business lawful in itself cannot be a nuisance *per se*, although, because of surrounding places or circumstances, or because of the manner in which it is conducted, it may become a nuisance. Certain kinds of business or structures, as powder houses or nitroglycerine works, are so dangerous to human life that they may be maintained only in the most remote and secluded localities. Others, as slaughter houses and certain foul smelling factories, are so offensive to the senses that they must be removed from the limits of cities and towns, and even

Ricks, J., quoting Langel v. City of Bushnell, 197 Ill. 20, 26, 63 N. E. 1086, per Boggs, J.

12. Whitmore v. Oronto Pulp & P. Co., 91 Me. 297, 307, 39 Atl. 1032, 64 Am. St. Rep. 229, 40 L. R. A. 377, per Emery, J. (a case of machinery and fixtures as between lessor and lessee or servant).

13. Campbell v. Seamen, 2 T. & C. (N. Y.), 231, 234, per P. Potter, J., case aff'd 63 N. Y. 568.

14. Kinney v. Koopman & Gerdes, 116 Ala. 310, 318, 319, 323, 22 So. 593, 37 L. R. A. 497, 67 Am. St. Rep. 119, per Coleman, J.

15. Dennis v. Eckhard, 3 Grants Cas. (Pa.), 390, 392, per Thompson, J.

from the near neighborhood of family residences. Yet there must be some proper place where every lawful business can be carried on, without danger of interference on the part of those who, in some slight degree, may be annoyed or endangered by the nearness of the objectionable occupation."[16] Again, "Only conduct which is a nuisance *per se* is at all times and under all circumstances a nuisance, although there are some lawful trades and modes of using property which by universal noxiousness and offensiveness are *prima facie* nuisances. But the fact that a certain business is *prima facie* a nuisance does not relieve the complainant of the necessity of proving that the business is in fact a nuisance."[17]

§ 17. **Nuisance distinguished from trespass.**—The distinction between a nuisance and a trespass is that in the former the injury is consequential and results generally from some act committed beyond the limits of the property affected, while in the latter the infringement of property rights is direct and the injury immediate. The act in the former is wrongful because of the consequent results. It consists in such a use of one's own property as to injure some right or interest of another. The law regards the injury, damage or discomfort thus occasioned and not the particular trade or occupation from which these result.[18] A nuisance may

16. The Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 420, 421, 37 L. R. A. 381, 47 N. E. 2, 62 Am. St. Rep. 532, per Howard, J.

17. Eller v. Koehler, 68 Ohio St. 51, 67 N. E. 89, 12 Am. Neg. Rep. 659.

18. Norcross v. Thomas, 51 Me. 503, 504, 81 Am. Dec. 588, per Dickerson, J.; Wright v. Syracuse B. & N. Y. R. Co., 49 Hun (N. Y.), 445, 448, 23 N. Y. St. R. 78, 3 N. Y. Supp. 480, per Kennedy, J.

"The distinction between trespass and nuisance consists in the former being a direct infringement of one's rights of property, while in the latter the infringement is the result of an act which is not wrongful in itself, but only from the consequences which may flow from it. In the one case the injury is immediate; in the other it is consequential, and generally results from the commission of an act beyond the limits of the property affected." High on Injunctions (3d ed.), § 739, citing Reynolds v. Clarke, 2 Ld. Raym. 1399 (where the distinction is made between trespass and trespass on the case, the former being the remedy where the act is immediately injurious, but where the act itself is not an injury, but a consequence from that act is prejudicial to the plaintiff, his proper remedy is by an action on the case). Weston v. Woodcock, 5 Mees. & Wals, 587

be merely a consequence of a perfectly lawful act, as in case of a subsidence of plaintiffs' lands resulting in injury to him caused by a lawful act of another in making mines.[19] In an early English case, upon a writ of enquiry of damages in trespass *continuando transgressionen*, it was insisted that the evidence might be given of consequential damage after the period specified, as well as in a nuisance which continued after the same period, and the cause is removed, if the effect continues afterwards, damage may be recovered for it. But Holt, C. J., said he "was not satisfied that the parity would hold, for the gist of the action in a nuisance is the damage; and therefore as long as there are damages there is ground for an action; but trespass is one entire act, and the very tort is the gist of the action." And therefore, he said: "He doubted, whether an action would lie for the continuance of a trespass as for that of a nuisance."[20]

§ 18. **Distinction between negligence and nuisance.**—There is a distinction between a case of negligence and of nuisance or consequential damage. Thus, if a corporation is clothed with the right of eminent domain and conducts its operations without negligence or malice and an injury results it is *damnum absque injuria*, but if no such right exists and consequential injuries result it is a nuisance.[21] If a person so uses his property as to injure materially the property and comfort of existence of those who dwell in the neighborhood, negligence is not essential to establish a cause of action for injuries of such a character, and in such case negligence should be proven. But where the damage is the necessary consequence of defendants' acts, or is incident to the business itself or the manner in which it is conducted, the law of negligence has no

(where there was an injury to plaintiff's possession, and, therefore, the subject of an action of trespass, but Parke, B., said: "There is no doubt that where there is a direct injury and also a consequential damage, that may form a subject-matter either of case or trespass; but where there is a direct injury to the soil and freehold, there is no other remedy but trespass."

19. Valley R. Co. v. Franz, 43 Ohio, 623, 2 West. 362, 4 N. E. 88.

20. The case of The Farmers of Hempstead Water, 12 Mod. * 510 (Case 869).

21. Hauck v. Pipe Line Co. Ltd., 153 Pa. St. 366, 374, 34 Am. St. Rep. 710, 20 L. R. A. 642, 26 Atl. 644.

application and the law of nuisance applies.[22] So where one does acts upon his own property which injure another he is liable even though in doing the act he was not guilty of negligence. Thus where defendant excavated a tunnel on his own land, extending under the bed of a stream, and the pressure of the water broke in the roof of the tunnel and the water rushed in and undermined plaintiffs' land, the defendant was held liable for the damage occasioned without proof of negligence or unskilfullness on his part.[23] Again negligence may exist in relation to a nuisance. It is a modification of the general rule, as to trespassers or bare licensees and the safety of children who are such, that the owner of open or other grounds where children are permitted to resort by such owner may be liable for his negligence in keeping on the premises any attractive danger or nuisance or unseen dangerous conditions whereby a child may be injured.[24]

§ 19. **Nuisance a question of degree—Difficult to define amount of annoyance.**—Although, as an abstract question, a right of action exists as well for a slight as for a great injury, such right not being dependent upon the degree of the injury,[25] nevertheless nuisance is a term that may be generally stated to consist of degrees; it may be very great or insignificantly slight.[26] This ques-

22. Bohan v. Port Jervis Gas Light Co., 122 N. Y., 18, 25 N. E. 246, 33 N. Y. St. R. 246, case affirms 45 Hun, 257, 27 Wkly. D. 136, 10 N. Y. St. R. 364.

23. Cahill v. Eastman, 18 Minn. 324, 10 Am. Rep. 184.

24. Ann Arbor R. Co. v. Kinz, 68 Ohio St. 210, 67 N. E. 479, 14 Am. Neg. Rep. 183, 189. See 1 Thompson's Conn. on Neg., § 1025.

That negligence may be an important factor, see State v. Portland, 74 Me. 268, 271, 272, 43 Am. Rep. 586, per Barrows, J.

25. Cooper v. Randall, 53 Ill. 24, 26.

26. Ackers v. Marsh, 19 App. D. C. 28, 44 (where it is said that where alleged nuisance is created by noise, smoke, odor and light, the question is one of degree as well as of locality); Campbell v. Seaman, 2 T. & C. (N. Y.), 231, 234, per P. Potter, J. (Injunction granted.) See, also, Eller v. Koehler, 68 Ohio St. 51, 67 N. E. 89, 12 Am. Neg. Rep. 659, per curiam (action for damages to health and property); Pottstown Gas Co. v. Murphy, 39 Pa. 257, 263 (action on the case against gas company); Powell v. Bentley & Gerwig Furniture Co., 34 W. Va. 804, 812, 12 L. R. A. 53, 12 S. E. 1085, 43 Alb. L. J. 433 (where Holt, J., says the question is in its very nature one of degree).

tion of degree depends upon varying circumstances so as to preclude a precise definition of what amount of annoyance, discomfort, or convenience will constitute a nuisance.[27] It is difficult to define just what degree of injurious influence must be reached in order to warrant the court in determining what circumstances constitute a nuisance. A mere tendency to injury is not sufficient, there must be something actually appreciable which of itself arrests the attention, that rests not merely in theory, but strikes the common sense of the ordinary citizen. The determination, however, of the question rests in sound judgment and depends upon common sense in each case.[28] So in a New Jersey case the court says: "But the question remains, what degree of discomfort is necessary to constitute a nuisance? It is clear that everything that renders the air a little less pure, or is to any extent disagreeable, is not necessarily a nuisance. . . . The word 'uncomfortable' is not precise. . . . In fact no precise definition can be given; each case must be judged by itself.[29] If property cannot be enjoyed unless the health is endangered thereby a nuisance exists.[30] It is not necessary, however, in order to constitute a nuisance that the annoyance should be of such a character as to endanger the health of a person or persons, or of the neighborhood, the act need not be positively unhealthy; it is sufficient if it occasions that which is offensive to the senses and that it in any way renders the enjoyment of life and property uncomfortable, or

"It is always a question of degree"). Crump v. Lambert, L. R. 3 Eq. Cas. 409, 414, per Lord Romilly, M. R. (Injunction to restrain issuing of smoke and effluvia from factory chimney); see Wesson v. Washburn Iron Co., 13 Allen (Mass.), 95, 100-103, 90 Am. Dec. 181, per Bigelow, C. J. (action to recover damages for nuisance to an inn and its occupation and to health).

27. Columbus Gas Light & Coke Co. v. Freeland, 12 Ohio St. 392, 399, per Gholson, J. (an action for nuisance and for damages caused by odors, etc., from manufactory).

28. State Board of Health of Hackensack v. Freeholders of Bergen, 46 N. J. Eq. 173, 177, 178, 18 Atl. 465, per Pitney, V. C. Bill filed by State to abate nuisance as dangerous to public health.

29. Ross v. Butler, 19 N. J. Eq. 294, 306, 97 Am. Dec. 654, per The Chancellor (bill brought by several individuals for nuisance to health and comfort, etc.).

30. Campbell v. Seaman, 2 Thomp. & C. (N. Y.), 231, aff'd 63 N. Y. 568, 20 Am. Rep. 567 (Injunction granted).

that it prevents its enjoyment in as full and ample a manner as before, that it invades or violates a vested right and materially interferes with the ordinary comfort of human existence[31] or renders one's dwelling house unfit for habitation;[32] and if the enjoyment of life and property has been so rendered uncomfortable, it is not indispensable to sustain a right of action that one should, by the annoyance or alleged nuisance, have been driven from his dwelling or habitation.[33] So even that which causes a well founded, reasonable apprehension of damage may be a nuisance.[34]

31. State v. Wetherall, 5 Har. (Del.), 487 (case of common nuisance); Barnes v. Hathorn, 54 Me. 124, 127, per Kent, J. (an action for damages); Ross v. Butler, 19 N. J. Eq. 294, 299, 301, 97 Am. Dec. 654, per The Chancellor (bill by several individuals for nuisance to health and comfort); Davidson v. Isham, 9 N. J. Eq. 186, 189 (bill to restrain business as nuisance); Cropsey v. Murphy, 1 Hilt. (N. Y.), 126, 127, per Brady, J. (action for damages); Catlin v. Valentine, 9 Paige Ch. (N. Y.), 575, 576, 38 Am. Dec. 567, per The Chancellor (bill to restrain erection of slaughter house); Brady v. Weeks, 3 Barb. (N. Y.) 157, 159, per Paige, J. (bill to restrain use of building as slaughter house); Burditt v. Swenson, 17 Tex. 489, 502, 67 Am. Dec. 665, per Wheeler, J. (petition for injunction for abatement and damages); Rex v. White, 1 Burr. 333, 337, per Lord Mansfield (conviction on indictment for mantaining nuisance near highway).

"The real question in all cases is the question of fact, viz., whether the annoyance is such as to materially interfere with the ordinary comfort of human existence." Crump v. Lambert, L. R., 3 Eq. Cas. 409, 413, per Lord Romilly, M. R., quoted in Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 570, 63 Am. St. Rep. 533, 39 Atl. 270, per Bryan, J. (action for damages for nuisance).

32. Hayden v. Tucker, 37 Mo. 214, 221, per Wagner, J.

33. Hayden v. Tucker, 37 Mo. 214, 221, per Wagner, J.; Ross v. Butler, 19 N. J. Eq. 294, 300, 97 Am. Dec. 654; Bohan v. Port Jervis Gas L. Co., 122 N. Y. 18, 23, 33 N. Y. St. R. 246, 25 N. E. 246, 9 L. R. A. 711, per Brown, J.; McKeon v. See, 51 N. Y. 300, 306, 10 Am. Rep. 659, per Hunt, C.; Fish v. Dodge, 4 Denio (N. Y.), 311, 316; Yocum v. Hotel St. George Co., 18 Abb. N. C. (N. Y.), 340, 341, per Brown, J.; Campbell v. Seaman, 2 T. & C. (N. Y.), 231, 237, per P. Potter, J.

It is not necessary that the house should be rendered useless in order to maintain an action; it is sufficient if the injury should be such as to render the enjoyment of life there uncomfortable. Aldrich v. Howard, 8 R. I. 246, 248, 249.

34. Barnes v. Hathorn, 54 Me. 124, 127, 128, per Kent, J., id. 133, per Dickerson, J., in dissenting opinion. Mohawk Bridge Co. v. Utica & S. R. Co., 6 Paige (N. Y.), 554; Burdett v. Swenson, 17 Tex. 489, 502, 67 Am. Dec. 665, per Wheeler, J.

Again, an action lies for a nuisance to the house or land of a person, whenever, taking all the circumstances into consideration, including the nature and extent of the plaintiff's enjoyment before the act complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law; and this whatever the locality may be where the act complained of is done.[35]

§ 20. **Injury must not be fanciful or imaginative—Judgment of ordinary men as test—State of health.**—The injury should not be merely theoretical or imperceptible.[36] The discomfort must be physical as distinguished from that which depends upon taste or imagination.[37] The act or omission must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or refined fancy. It should not be merely speculative and mental or of a temporal and spiritual character only. The fact that a person is fastidious or overrefined, so that his taste is offended or his nerves disturbed, does not make that a nuisance which would have no effect upon another, or upon all others without those peculiar sentiments and tastes. The judgment of reasonable men should be the test, and also the effect which the alleged nuisance would have upon men of normal nervous sensibilities and of ordinary tastes, habits, and modes of living, having in view all the circumstances of the case, the vested and clear rights of complainant, and also the actual injury produced. On the other hand, a nuisance is none the less one because there may be persons whose habits and occupations have brought them to endure the same annoyance without discomfort or inconvenience, where such nuisance is offensive to persons generally, or produces physical discomfort, annoyance and inconvenience in a material degree, and substantially interferes with the ordinary

35. Bamford v. Turnley, 3 Best & S. 62, 113 Eng. C. L. 61, Pollock, C. B., *dissentiente*.

36. Dorman v. Ames, 12 Minn. 451, Gilf. 347, 358 (an action to recover damages and for abatement of nuisance).

37. Wahle v. Reinbach, 76 Ill. 322, 327, per Scholfield, J. (a bill in equity); Westcott v. Middleton, 43 N. J. Eq. 478, 486, 11 Atl. 490, 10 Cent. 202; Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 205, 206.

comfort of human existence.[38] So the court, in an Ohio case, says: "Regard should be had to the notions of comfort and convenience entertained by persons generally, of ordinary tastes and susceptibilities. What such persons would not regard as an inconvenience materially interfering with their physical comfort, may be prop-

38. Cooper v. Randall, 53 Ill. 24 (if inconvenience is a clear and plain interference and not fanciful merely, it is sufficient to sustain an action on the case although the jury would not give damages when incapabale of reasonable measurement in dollars and cents); Owen v. Phillips, 73 Ind. 284, 295 (the question of nuisance or no nuisance does not depend upon whether the acts complained of cause discomfort to persons of elegant and dainty modes and habits of living. This case was one for injunction and abatement); Dittman & Berger v. Ripp, 50 Md. 516, 522, 523, 33 Am. Rep. 325 (the judgment of reasonable rule and men of ordinary sensibilities, habits, and tastes, should constitute the test, as well, also, as the actual physical discomfort sustained by the invasion of the plaintiff's rights, considering all the circumstances of the case, where remedy by injunction is sought against an existing or threatened nuisance); Rogers v. Elliott, 146 Mass. 349, 350, 351, 4 Am. St. Rep. 316, 15 N. E. 768 (the effect upon ordinary persons or others generally, is the test, not the effect upon particular persons peculiarly susceptible. This case was an action of tort for a nuisance); Harper v. Standard Oil Co., 78 Mo. App. 338, 345, 2 Mo. App. Rep'r, 221 (should be a just apprehension of the injury in the minds of persons of normal nervous sensibility); Westcott v. Midleton, 43 N. J. Eq. 478, 486, 11 Atl. 490, 10 Cent. 202 (a nuisance is none the less so because there may be persons whose habits and occupations have brought them to endure the same annoyance without discomfort. The injury must be physical as distinguished from one purely imaginative. It must be something that produces real discomfort or annoyance through the medium of the senses, not from delicacy of taste or refined fancy); Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201, 206 (same points as last citation); Ross v. Butler, 19 N. J. Eq. 294, 298, 97 Am. Dec. 654 ("The law takes care that lawful and useful business shall not be put a stop to on account of every trifling or imaginary annoyance such as may offend the taste or disturb the nerves of a fastidious or over-refined person"); Butterfield v. Klaber, 52 How. Pr. (N. Y.), 255, 258, 264 ("People, however, who have extraordinary sensibilities, or nervous temperaments, the sick, the afflicted, they whose refined tastes, habits and inclinations lead them to prefer complete silence and seclusion, and an abode remote from the busy haunts of human industry, are not to be selected as best qualified to attest or determine the precise limits of mutual forbearance or the absolute essentials of comfortable enjoyment." There must be a material interference with the comfortable existence

erly attributed, when alleged to be a nuisance, to the fancy, or fastidious taste, of the party. On the other hand, the charge of a nuisance, if it be of a thing offensive to persons generally, cannot be escaped by showing that to some persons it is not at all unpleasant or disagreeable."[39] And in a Pennsylvania decision it is declared that the true rule in judging of an injury from nuisances is, that it be such as naturally and necessarily results to all alike who were within their influence, not to one on account of peculiar sentiments, feelings, or tastes, if it would have no effect on another, or all others without those peculiar sentiments or tastes. It must be something about the effects of which all agree; otherwise, that which might be no nuisance to the majority, might be claimed to deteriorate property by particular persons.[40] So in a West Virginia case it is also declared, that in fixing the standard by which to measure what shall be deemed a nuisance the nature of the man offended as well as the nature of the thing offending must be considered. For such standard one should not be taken who by reason of his sensitive nature, inborn or acquired, or by reason of his habits or mode of living, is supersensitive to the annoyance complained of; nor, on the other hand, are we to take

of ordinary people in good health. This case was an application for an injunction); Neuhs v. Graselli Chemical Co., 8 Ohio Dec. 203, 213, 5 Ohio N. P. 359 (one is not obliged where he respects his neighbors' legal rights, to consult their tastes and fancies as to what use he may make of his property); Sparhawk v. Union Passenger Ry. Co., 54 Pa. 401, 424, 428 (the injury must be of a temporal, not merely of a spiritual character, although an injury is alleged and proven, but such injury is not tangible or material and is merely speculative and mental or spiritual only, it is *damnum absque injuria* and not cognizable in the courts. This case was a bill in equity); Scott v. Forth, 4 Fost. & Y. 349, 350, 10 Law T. 240 (must be such a sensible and real damage, having regard to the situation and mode of occupation of the property injured, as a sensible person would find injurious. This was a case of action for a nuisance); Anony. 3 Atk. 750 ("The fears of mankind though they be reasonable will not create a nuisance," per Lord Hardwicke, quoted in Rhodes v. Dunbar, 57 Pa. 274, 289, 98 Am. Dec. 221).

39. Columbus Gas Light & Coke Co. v. Freeland, 12 Ohio St. 392, 399, per GHOLSON, J., a case of action for a nuisance and damages.

40. Sparhawk v. Union Passenger Ry. Co., 54 Pa. St. 401, 427. Case was bill in equity.

one who, by nature or habit, is abnormally insensible to such things. The idiosyncrasies or peculiar habits or modes of living of neither class furnish the proper test. The standard must be the normal man; the one of ordinary sensibility, of ordinary habits of living, the plain, well-to-do people who make up the great mass of the busy world.[41] So in a frequently cited English case it is said substantially that the inconvenience should be something more than fanciful, or as one of mere delicacy or fastidiousness, that is, an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain, sober and simple notions among the English people. If the alleged nuisance, if prosecuted, abridge and diminish seriously and materially the ordinary comfort and existence to the occupier and inmates of a dwelling house, whatever their rank or station or state of health may be, it may constitute a nuisance.[42] Again, an injury to single individual, from lead poisoning, because of a peculiar and exceptional sensibility or susceptibility of such person to such influence, when a trace of arsenic or lead was so slight as not in any degree to affect other persons, would not be sufficient to make leadworks a common or public nuisance;[43] and where

41. Powell v. Bentley & Gerwig Furniture Co., 34 W. Va. 804, 810, 12 S. E. 1085, 12 L. R. A. 53, 43 Alb. L. J. 433, per HOLT, J., who discusses the matter "on grounds common to a suit at law for damages, and a suit in equity to forbid, abate or restrain."

42. Walter v. Selfe, 15 Jur. 416, 419, 4 Eng. L. J. Eq. 15, 4 DeG. & Sm. (a case for injunction), per Knight Bruce, V. C., quoted, considered or cited in Akers v. Marsh, 19 App. D. C. 28, 45; Cooper v. Randall, 53 Ill. 24, 27; Rogers v. Elliott, 146 Mass. 349, 352, 4 Am. St. Rep. 316, 15 N. E. 768; Westcott v. Middleton, 43 N. J. Eq. 478, 486, 11 Atl. 490, 10 Cent. 202; Ross v. Butler, 19 N. J. Eq. 294, 298, 299 (compare id. 305), 97 Am. Dec. 54; Sparhawk v. Union Passenger Ry. Co., 54 Pa. St. 401, 427; Crump v. Lambert, L. R. 3 Eq. 409, 412, per Lord Romilly, M. R., where it is said: "This definition is adopted in Soltau v. De Held, 2 Sim. N. S. 133, by Vice-Chancellor Kindersley, and is, I apprehend, strictly correct; and it agrees with the principle of all the cases referred to at common law and approved in the case of St. Helens Smelting Co. v. Tipping, 11 H. L. C. 642," 11 H. L. Cas. Full reprint 1483.

43. Price v. Grantz, 118 Pa. 402, 412, 21 Wkly. N. of C. 6, 11 Atl. 794, 10 Cent. 618, 4 Am. St. Rep. 601, an

sunstroke has caused a like susceptibility to noise, which does not affect persons of ordinary health and strength, no ground of action exists, in the absence of express malice, for causing such noise.[44] So the delicate condition of a female plaintiff whereby she is annoyed and disturbed by noise incident to playing a croquet game at night, there being no malicious motive in so playing, is subject to a like rule.[45] And where it does not appear that any save a single person of most sensitive taste on the subject has been annoyed equity will not interfere.[46] Again, whether a thing is or is not a nuisance does not depend upon and is not to be measured by the natures of people living in a designated locality, as the natures of one class may differ from those of another.[47] An act may, however, be "injurious to the health," under a statute, and so afford a ground for relief, where it is calculated to cause sick persons to suffer even though not injurious to persons in sound health.[48]

§ 21. **Trifling inconvenience or discomfort.**—Where the discomfort is almost imperceptible and wholly unsubstantial no such nuisance exists as to warrant relief, for not every trifling injury or inconvenience constitutes an actionable nuisance.[49] So where an employment, which is not a nuisance *per se,* is a useful one, the fact that it will produce some discomfort or even some injury to those near by will not justify an injunction.[50] Again, it is

action in case; declaration was as for a common nuisance with averment of special damage.

44. Rogers v. Elliott, 146 Mass. 349, 4 Am. St. Rep. 316, 15 N. E. 768 (a case of tort for a nuisance).

45. Akers v. Marsh, 19 App. D. C. 28. In this case it was also charged that the husband was an architect and that his work required the full composure of his nervous system, etc. Relief by injunction was sought.

46. Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490, 10 Cent. 202.

47. Owen v. Phillips, 73 Ind. 284, 294, 295 (a case of prayer for injunction and for abatement).

48. Malton Local Board v. Malton Farmers Manure Co., 49 L. J. M. C. 90, 44 J. P. 155, 4 Ex. D. 310, under Public Health act, 1875, s. 114.

49. Shaw v. Forging Co., 10 Ohio Dec. 107, 110; Neuhs v. Grasselli Chemical Co., 8 Ohio Dec. 203, 213, 5 Ohio N. P. 359. See, also, Price v. Grantz, 118 Pa. 402, 4 Am. St. Rep. 601, 11 Atl. 794, 10 Cent. 618, 21 Wkly. N. C. 6.

50. Huckenstine's Appeal, 70 Pa. 102, 106, 70 Am. Rep. 669, cited in Campbell v. Seaman, 63 N. Y. 568, 581, 20 Am. Rep. 567.

declared in an English case that where an injury to property is claimed in a neighborhood where many great manufacturing works are carried on the law does not regard trifling inconveniences. Everything must be looked at from a reasonable point of view. The law only regards sensible inconveniences which sensibly diminish the comfort, enjoyment or value of the property which is affected; that is, the injury to be actionable must be such as visibly to diminish the value of the property and the comfort and enjoyment of it. In places where great works are carried on persons must not stand on their extreme rights and bring actions in respect to every matter of annoyance.[51] So where an injunction was sought to restrain a gas company from opening up the streets and laying down gas pipes, the court refused to restrain the company from continuing their works because the nuisance or damage, if any existed, was of a transient or trivial nature "that to no one spot, or to no one individual can it be said to be more than a passing and almost imaginary evil."[52]

§ 22. **Substantial, tangible, material and appreciable injury.** —As we have elsewhere substantially stated an action may be sustained where there is an injury without actual damage, and that if a clear legal right has been clearly invaded damage may be presumed and at least nominal damages are recoverable in such case.[53] It is also true that nuisance is a question of degree difficult to define.[54] These rules must, however, be construed in connection with another general rule which is this: that in order to create a nuisance from the use of property a material, substantial and appreciable injury must be occasioned to the person or property of another. The ordinary comfort of human existence or the physical enjoyment of life and property, must be essentially interfered with or rendered inconvenient, or the value

51. St. Helens Smelting Co. v. Tipping, 11 H. L. Cas. 642, 644, 652, 35 L. J. Q. B. 66, 13 W. R. 1083. 12 L. T. 776, 11 Jur. N. S. 785, per Lord Wensdale in opinion, and per Mr. Justice Mellen in charge to jury.

52. Attorney-General v. The Sheffield Gas Consumers Co., 19 Eng. L. J. Eq. 639, 17 Jur. 677, 22 L. J. N. S. Ch. 811, 3 DeG. M. & G. 304, 1 W. R. 185.

53. See § 39 herein.

54. See § 19 herein.

of property substantially impaired.[55] A substantial damage may, however, be occasioned by a nuisance even though the land affected

55. Hoadley v. Seward & Son Co., 71 Conn. 640, 646, 42 Atl. 997 (case of action for damages and for injunction), per Andrews, C. J., who says: "To constitute a nuisance, the use must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render its enjoyment specially uncomfortable or ineonvenient," citing Campbell v. Seamen, 63 N. Y. 568, 576; Hurlburt v. McKane, 55 Conn. 31.

The use must be such as to work a tangible injury to the person or property of another, or such as renders the enjoyment of property essentially uncomfortable. It must be such a use as produces a tangible, appreciable injury to the proprety, or as renders its enjoyment essentially uncomfortable or inconvenient. Flood v. Consumers Co., 105 Ill. App. 559, 562, per Burke, J. (a case of a bill for an injunction).

"The annoyance, inconvenience or discomfort complained of must be a subsisting and substantial grievance, materially affecting the ordinary comfort of human existence, as understood by the American people in their present state of enlightenment, and not according to the crude and fanciful notions of a semi-barbarous, or less enlightened age." Barnes v. Hathorn, 54 Me. 124, 131, per Dickerson, J., in dissenting opinion (a case of action for damages).

"The extent of the injury is not generally considered very important. It should be substantial of course and not merely nominal," applied to obstruction of public highway and special injury to private person. Wakeman v. Wilbur, 147 N. Y. 657, 663.

"It has always been the law that in order to subject one to an action for nuisance the injury must be material and substantial. It must not be a figment of the imagination. It must be substantial." Eller v. Koehler, 68 Ohio St. 51, 55, 67 N. E. 89, 12 Am. Neg. Rep. 659 (an action for damages to health and property by noise and vibration occasioned by steam hammers).

There must be a substantial, not a trifling injury. Price v. Grantz, 118 Pa. 402, 4 Am. St. Rep. 601, 10 Cent. 618, 11 Atl. 794, 21 Wkly. N. C. 6.

Substantial, tangible, material injury must be shown. Sparhawk v. Union Passenger Ry. Co., 54 Pa. St. 401, 424, 428, per Thompson, J.

"It is well settled that the law gives protection only against substantial injury. To be of legal cognizance the injury must be tangible or the discomfort perceptible to the senses of ordinary people. . . . In other words the comfort, enjoyment, or use must be materially affected or impaired." Stadler v. Grieben, 61 Wis. 500, 504, 21 N. W. 629 (action at law under §§ 3180, 3181, Rev. Stat.).

Damages must be sensible and real, not merely nominal, regard being had to the situation, use and mode of enjoyment of the property injured. Scott v. Firth, 4 Fin. & F. 349, 10 Law T. 240.

may be sold thereafter for as large a sum as before.[56] In case the alleged nuisance consists of noxious gases or vapours the injury must be substantial and real as distinguished from a mere trifling injury consequent upon carrying on the business in a proper way.[57] The damage must also in such case, be actual, visible, and substantial, such as is apparent to an ordinary person and not merely perceptible by means of scientific or microscopic examination,[58] and generally scientific conclusions from facts are to be regarded as secondary in importance to facts proved.[59] Again, it is declared that in order to warrant redress in equity a substantial and essential injury must be done; there must be a wrongful invasion of a legal right and the resulting damage must be serious and substantial.[60] So where it is sought to restrain a person from improving his property there must, in order to obtain relief, be a real and sensible injury to the right of the complainant.[61] But a danger, which is apparent and real, as distinguished from an imaginary fear of injury, from the alleged nuisance may warrant equitable relief.[62]

§ 23. **Acts of several persons may constitute a nuisance.**—The acts of several persons together may constitute a serious injury and a nuisance which the court will restrain even though the amount of obstruction caused by any of them might not, if it stood alone, be appreciable or sufficient to give any ground of complaint.[63]

§ 24. **General nature and character of nuisance as affecting remedy or relief.**—It is a factor of importance, affecting the

56. Penn v. Taylor, 24 Ill. App. 292.

57. Price v. Grantz, 118 Pa. 402, 4 Am. St. Rep. 601, 11 Atl. 794.

58. Salvin v. North Brancepeth Coal Co., 44 L. J. Ch. 149, 31 L. T. 154, L. R. 9 Ch. 705, 22 W. R. 904 (case for mandatory injunction).

59. Goldsmid v. Tunbridge Wells Improvement Commissioners, 35 L. J. Ch. 382, 12 Jur. N. S. 308, 14 W. R. 562, L. R. 1 Ch. 349, 14 L. T. 154.

60. Owen v. Phillips, 73 Ind. 284, 291, per Elliott, J. See § 27 herein.

61. Shrieve v. Voorhies, 3 N. J. Eq. 25.

62. Cheatham v. Shearon, 1 Swan (31 Tenn.), 213, 55 Am. Dec. 734.

63. Thorpe v. Brumfitt, L. R. 8 Ch. App. Cas. 650; case and principle applied in Lambton v. Mellish, 63 L. J. Ch. D. 929, 71 L. T. 385 [1894], 3 Ch. 163, 43 W. R. 5.

remedy or relief, whether the claimed nuisance is a continuing, constantly recurring and permanent one, or merely a temporary or slight one in its nature or character.[64] A nuisance, may, however,

64. St. Louis, Iron Mountain & Southern Ry. Co. v. Biggs, 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804 (a case of successive recoveries for permanent nuisance, and statute of limitations); Southern Ry. Co. v. Cook, 117 Ga. 286, 43 S. E. 697 (judgment for nuisance not permanent not a bar to fresh action for damages); Oswald v. Wolf, 129 Ill. 209 (grievance must be continually recurring to warrant relief in equity); Owen v. Phillips, 73 Ind. 284; Cleveland, Cincinnati, Chicago & St. Louis Ry. Co. v. King, 23 Ind. App. 573, 55 N. E. 875 (a case of election of remedy for permanent injury or continuous wrong and extent of recovery); Holbrook v. Griffis, Iowa, 1905, 103 N. W. 479 (distinction between permanent and temporary nuisance as to measure of recovery); Shively v. Cedar Rapids, Iowa Falls and Northwestern Ry. Co., 74 Iowa, 169, 7 Am. St. Rep. 471, 37 N. W. 133 (a case of temporary nuisance and damages); Baldwin v. Oskaloosa Gas Light Co., 57 Iowa, 51, 10 N. W. 317 (a case of a finding equivalent to one for permanent injury); Powers v. City of Council Bluffs, 45 Iowa, 652, 24 Am. Rep. 792 (continuance of nuisance and nature of damage); Elizabethtown, Lexington & Big Sandy R. Co. v. Combs, 10 Bush (73 Ky.), 382, 19 Am. Rep. 67 (single recovery where injury is continuing and permanent); Cumberland v. Oxford Canal Co. v. Hutchings, 65 Me. 140 (continuing nuisance and damages); Cadigan v. Brown, 120 Mass. 493 (joinder of parties where permanent injury threatened); County of Stearns v. St. Cloud, Mankato & Austin R. Co., 36 Minn. 425, 32 N. W. 91 (injunction lies where nuisance of permanent nature); Learned v. Hunt, 63 Miss. 373 (right to injunction where nuisance continuing or constantly recurring); Harretson v. Kansas City & Atlantic R. Co., 151 Mo. 482, 52 S. W. 368; Pinney v. Berry, 61 Mo. 359 (continuing nuisance and measure of damages); Markt v. Davis, 46 Mo. App. 272 (when damages not to be awarded where nuisance a continuing one, permanent injury distinguished); Town of Troy v. Cheshire R. Co., 23 N. H. 83 (extent of recovery in damages where injury of permanent character or temporary, uncertain or contingent); Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335 (right to injunction where nuisance long continued or constantly recurring); City of Mansfield v. Hunt, 19 Ohio Cir. Ct. R. 488, 10 O. C. D. 567 (distinction as to damages in cases where injury permanent and where it may be removed); Toledo v. Lewis, 9 Ohio Cir. Dec. 451, 456 (distinction should be taken between permanent injuries and those not); Umscheid v. City of San Antonio, Tex. Civ. App. 1902, 69 S. W. 496, 5 Tex. Ct. Rep. 562 (when recovery may be had for permanent or temporary injury; also, action for permanent injury should be for entire damages); City of San Antonio v. Mackey's Estate,

exist where the injury is occasional and not constant or continuous.[65] So noise may constitute such a nuisance that it will be restrained when the acts producing it are done twice a week for several hours continuously within a short distance of a dwelling house.[66] Again, a nuisance caused by smoke, cinders, or noise, or

22 Tex. Civ. App. 145, 54 S. W. 33 (damages where injury not permanent); Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. Ed. 739, 2 Sup. Ct. 719 (equity will restrain continuous injury or annoyance); Goldsmid v. Tunbridge Wells Improvement Commissioners, 35 C. J. Ch. 382, 384, 12 Jur. N. S. 308, 14 W. R. 562, L. R. 1 Ch. 349, 11 L. T. 154 (the court ought not to interfere in cases in which the injury is merely temporary and trifling, but ought to do so where the injury is permanent and serious, per Lord Justice Turner).

See Appeal of Stewart, 56 Pa. 413 (remedy at law for a single trespass, etc., and equity for constantly recurring trespass); Nashville v. Comar, 88 Tenn. 415, 12 S. W. 1027, 7 L. R. A. 465. Examine generally Ottenot v. New York, Lackawanna & Western R. Co., 119 N. Y. 603, 1 Silv. C. A. 469, 28 N. Y. St. R. 483, 23 N. E. 169.

65. Meigs v. Lister, 23 N. J. Eq. 199, 205 (cited in Evans v. Reading Chemical Fertilizing Co. Ltd., 160 Pa. 209, 227, 28 Atl. 702); Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567. See Dennis v. Eckhardt, 3 Grant's Cas. (Pa.) 390, 392, per Thompson, J. Compare Fay v. Whitman, 100 Mass. 76 (Instruction "3" pp. 77, 78); Cooke v. Forbes, L. R. 5 Eq. Cas. 166, 37 L. J. Ch. 178, 17 L. T. 371.

If the damage is small and the injury only occasional rather than a probable and necessary consequence equitable relief will be denied. Akens v. Marsh, 19 App. D. C. 28, 43, per Alvey, C. J.

If injury occasional or temporary only no ground for injunction exists except in extreme cases. Swaine v. G. N. Ry., 4 DeG. J. & S. 211, 69 Eng. Ch. Rep. 164 (* 211), 33 L. J. Ch. 399, 3 N. R. 399, 10 Jur. N. S. 191, 9 L. T. 745, 12 W. R. 391.

In an English case the court says: "Again, it is said that the annoyance was to last only for a short time. This would have been a most important consideration if the time had only been a few days, and the court will be more strict as to proof in case of a nuisance only lasting eight weeks than in a case of a permanent one. . . . The plaintiff cannot complain of the temporary crowding occasioned by people going to the circus and leaving it." This case was one for injunction to restrain a circus performance near plaintiff's house, and a distinction was made between crowds and noise. Inchbald v. Robinson; Same v. Barrington, L. R. 4 Ch. 388, 20 L. T. 259, 17 W. R. 459.

66. Walker v. Brewster, L. R. 5 Eq. Cas. 25. See Attorney-General v. The Sheffield Gas Consumers Co., 19 Eng. L. & Eq. Rep. 639, 651, 17 Jur. 677, 22 L. J. Rep. N. S. Ch. 811, per

offensive odors, may possibly occur so seldom that it will not be held to produce material discomfort. Where the occurrence is only accidental, recurring only a few times a year and not intended to be again permitted, it may not be a ground for an injunction, but only for a remedy in damages. But a clear and unmistakable nuisance, which it is intended to commit periodically, will not be permitted because it does not exist the greater portion of the time, but only for a small portion of it. It is no justification to a wrong doer that he takes away only a fractional part of his neighbor's property, comfort or life.[67] It is also said that a presumption exists that a nuisance is of a transitory or temporary character, where it grows out of acts which the law has not authorized and because a legal mode exists whereby it may be removed or abated.[68]

The Lord Chancellor in argument only "by way of illustration."

67. Ross v. Butler, 19 N. J. Eq. 294, 302, 97 Am. Dec. 654.

68. Neitzy v. Baltimore & Potomac R. Co., 5 Mackey (D. C.), 34, 3 Cent. R. 773.

CHAPTER III.

Essentials—Fundamental and General Principles.

Section 25. Fundamental governing principles generally.
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48. Neglect to abate nuisance—Omission of duty.
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§ 25. Fundamental governing principles generally.—The following general underlying principles govern the doctrine of nuisances and the remedy: Every person is entitled, in some degree

at least, to the enjoyment of certain private rights, whether they are personal or property rights or both, and also to the enjoyment of certain public rights, and when such rights clearly exist, or are vested, there ought not to be an unlawful or unreasonable violation or infringement thereof which will work a material injury or damage to the person or persons in whom they exist or are vested either individually, as a private citizen, or collectively; nor should there be an omission to perform a duty, which one is legally obligated to perform, which will cause another such material injury or damage. These principles run through all the decisions.

§ 26. **Property rights generally—Luxuries—Delicate nature of property.**—A person has the right not only to have his property protected from wrongful injury but also the right to be protected in its lawful enjoyment. The alleged nuisance may work a house no material injury and yet be of such a character as to render it impossible for the owner to live in it with comfort, therefore an injury need not be proven both to the property itself and also an interference with its enjoyment.[1] And although an act may be in itself lawful yet if it is done in a particular place and so necessarily tends to the injury and damage of another's property it constitutes a nuisance.[2] Articles of luxury are also so much under the protection of the law as those of necessity.[3] So a noxious trade producing vapors or gases, injurious to vegetable life, used for ornamental purposes or of a delicate nature or otherwise, may constitute a nuisance,[4] provided the injury is visible, actual and substantial.[5] But the doing of something not in itself noxious does

1. Owen v. Phillips, 73 Ind. 284, 293, 294.

2. Cooper v. Birge, 9 Ga. 425, 54 Am. Dec. 347.

3. Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567.

4. Georgia Chemical, etc., Co. v. Colquitt, 72 Ga. 172; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Imperial Gas Light & Coke Co. v. Broadbent, 7 H. L. Cas. 600, 5 Jur. N. S. 1319, 29 L. J. Ch. 377; Broadbent v. The Imperial Gas Co., 7 DeG. M. & G. 436, 56 Eng. Ch. Rep. 337 (* 434), 26 L. J. Ch. 276, 5 W. R. 272, 3 Jur. N. S. 221; Saville v. Kilner, 26 Law T. N. S. 277, 279. See §§ 135 *et seq.* herein as to noxious vapors.

5. Salvin v. North Brancepeth Coal Co., 44 L. J. Ch. 149, 31 L. T. N. S. 154, L. R. 8 Ch. 705, 22 W. R. 904. See §§ 20-22 herein.

not become a nuisance merely because it does harm to some particular trade of a delicate nature in the adjoining property where it does not affect any ordinary trade carried on there nor interfere with the ordinary enjoyment of life. A man who carries on an exceptionally delicate trade cannot complain because it is injured by his neighbor doing something lawful on his property, if it is something which would not injure an ordinary trade or anything but an exceptionally delicate trade.[6]

§ 27. **Sic utere tuo ut alienum non laedas.**—The maxim that one should enjoy or use his own property so as not to injure that of another, or the rights, of another,[7] is a principle of extensive application in the law of nuisance. It is a sound as well as an ancient maxim of the law. It is an established rule as old as the common law itself and is supported by the soundest wisdom. It may be extended in its meaning to the rule that one should not so use his property as to work harm or annoyance to another or use it in such manner as to infringe upon the rights of others, as for instance, one should not generally erect structures in such close proximity to his neighbors' dwelling house which are of such a character as to render it unfit for habitation. But the injury contemplated is a legal injury, an invasion of some legal right, such as erecting a building, or carrying on a business on one's own land, or removing the soil, or placing something on the soil of another, which so hinders, interferes with, or obstructs the enjoyment by another of his property as amounts to a nuisance.[8] Again, it is an implied obligation on the part of every citizen that he holds his property and will use it subject to the rights of others to enjoy the use of their own property, since the ownership of property will

6. Robinson v. Kilvert, 58 L. J. Ch. 392, 41 Ch. D. 88, 94, 96, 97, 61 L. T. 60, 37 W. R. 545, criticising head note in Cooke v. Forbes, 37 L. J. Ch. 178, L. R. 5 Eq. 166, 17 L. T. 371 (as going further than is warranted by the case, said head note being this: "It is no answer to a complaint, by a manufacturer, of a nuisance to his trade to say that the injury is felt only by reason of the delicate nature of the manufacture").

7. Broom's Leg. Max. (7th Amer. ed., 1874), p. 364, * 366—* 395.

8. Hayden v. Tucker, 37 Mo. 214, 221, per Wagner, J.; Pickard v. Collins, 23 Barb. (N. Y.), 444, 458.

not justify the use of it[9] in such a way as to distress and physically annoy others.[10] So, under the Louisiana law, although a proprietor may do with his estate what he pleases, still he cannot make any work on it which may deprive his neighbor of the liberty of enjoying his own, or which may be cause of damage to him;[11] and if a person brings, or accumulates, on his land anything which, if it should escape, may cause damage to his neighbor he does so at his peril and is responsible, although he may have taken care and precaution to prevent the damage.[12] In a West Virginia case it is said that the law of nuisance: "Is founded on what we call the absolute rights of liberty and property. Each man has the right to that which he has made his own and without control or diminution, save by the laws of the land. If each has it, all have it; so that it follows from this that each one must so use his property and rights as not to injure those of others. Each has his right for himself, and owes a corresponding duty to the other."[13]

9. State v. Yopp, 97 N. C. 477, 2 S. E. 458, 2 Am. St. Rep. 305.

10. Sparhawk v. Union Pass. Ry. Co., 54 Pa. 401, 429.

11. Wilson v. Great Southern Teleph. & Teleg. Co., 41 La. Ann. 1041, 1046, 6 So. 781, citing R. C Code, 667, 505.

12. Wilson v. City of New Bedford, 108 Mass. 261, 266, 11 Am. Rep. 352; Rylands v. Fletcher, Law Rep. 3 H. L. 330, 340, per Lord Cranworth, case affirms Fletcher v. Rylands, 1 Exch. 265, which (at p. 280), is criticised in Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 150, 152, 57 Am. Rep. 445, 6 Atl. 453. See §§ 382 et seq. herein.

See, also, Kinnaird v. Standard Oil Co., 89 Ky. 468, 11 Ky. L. Rep. 692, 7 L. R. A. 451, 30 Cent. L. J. 267, 12 S. W. 937, 41 Alb. L. J. 227.

13. Powell v. Bentley & Gerwig Fur. Co., 34 W. Va. 804, 807, 12 L. R. A. 53, 12 S. E. 1085, per Holt, J.

See, further, as to the maxim *sic utere, etc.* Grady v. Wolsner, 46 Ala. 381, 382, 7 Am. Rep. 593, per Sanford, J.; Hoadley v. Seward & Son Co., 71 Conn. 640, 646, 42 Atl. 997 per Andrews, C. J.; Bonner v. Welborn, 7 Ga. 296, 311, per Nisbett, J.; Barnes v. Hathorn, 54 Me. 124, per Hunt, J.; Gerrish v. Proprietors of Union Wharf, 26 Me. (13 Shep.), 384, 392, 46 Am. Dec. 568, per Shepley, J.; Scott v. Bay, 3 Md. 431; Wesson v. Washburn Iron Co., 13 Allen (Mass.), 95, 104, 90 Am. Dec. 181, per Bigelow, C. J.; Ross v. Butler, 19 N. J. Eq. 294, 304, 97 Am. Dec. 654; Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 24, 25 N. E. 246, 33 N. Y. St. R. 246, 9 L. R. A. 711 and note, per Brown, J.; Fish v. Dodge, 4 Denio (N. Y.), 311, 316, per Bronson, Ch. J.; Radcliff v. Mayor, etc., of Brooklyn, 4 N. Y. (4 Comst.), 195, 198 *et seq.*, 53 Am. Dec. 357, per Bronson, C. J.; Yocum v. Hotel St.

§ 28. **Sic utere, etc., continued—Control of use of property.** —The maxim *sic utere,* etc., has been extended, so that, under this general principle of the common law, one who owns property is obligated to control the use thereof so as not to produce injury to others; and if another is permitted by such owner to place the latter's premises in such a situation, or to use them in such a way as to cause injury to another the owner may be held liable therefor.[14] But a person can have no action for annoyance and hurt which he has sustained from acts of third persons, done on land adjoining his own, which the proprietor thereof might lawfully have done in the exercise of his dominion over his own property.[15] So it is also said that merely permitting another to commit a nuisance does not render one lible for its consequences.[16]

§ 29. **Sic utere, etc.—Maxim to be applied with caution.** Great caution should be exercised in determining to what extent the restriction embodied in the maxim *sic utere,* etc., should be applied and in controlling one in the use and enjoyment of his property, and in holding him liable for injury or damage which another may sustain by such use and enjoyment, for the varying circumstances of each particular case are most important factors.[17] This rule applies not only to cases of liability in general, but also to the law of nuisances. A nuisance does not necessarily exist even though one may by the use of his own property cause an injury or damage to another. The case may be one known as *damnum absque injuria,* and the factors of locality, of unauthorized, or unreasonable use are of weight.[18]

George Co., 18 Abb. N. C. (N. Y.), 340, 341, per Brown, J.; Campbell v. Seaman, 2 T. & C. (N. Y.), 231, 233-235, per P. Potter, J.; Crawford v. Atglen Axle & Iron Mfg. Co., 1 Chest. Co. Rep. (Pa.), 412, per Clayton, P. J.; Tipping v. St. Helen's Smelting Co., 11 H. L. C. 642, 116 Eng. C. L. 1093, 11 H. L. Cas. full reprint, 1483.

14. Gardner v. Heartt, 2 Barb. (N. Y.), 165, 168, per Harris, J. See, however, sections herein as to landlord and tenant.

15. McLauchlin v. Charlotte & So. Car. R. Co., 5 Rich. Law (27 S. C.), 583.

16. Langabough v. Anderson, Ohio, 67 N. E. 286, 14 Am. Neg. Rep. 170, 181.

17. See generally Broom's Leg. Max. (7th Amer. ed., 1874), * 372 *et seq.*

18. See Bliss v. Grayson, 24 Nev. 422, 454, 455, 56 Pac. 231, per Massey, J., citing 1 Wood on Nuis., p. 3 (§ 2). Bohan v. Port Jervis Gas

§ 30. Natural right to use of property and right to artificial use.—"*Sic utere tuo ut alienum non laedas,* is a maxim well known to our law; but the propriety of applying this maxim to a particular case sometimes becomes a question of great doubt, from the difficulty of determining what is legal injury to the property of another. The erection of a new mill, in the immediate vicinity of one which had previously been erected by another person, might in fact destroy a moiety of the value of his mill. Yet this maxim could not properly be applied to such a case. The owner of the first mill sustains no legal damage, because at the time he erected it he knew his neighbor had a legal right to make a similar improvement on his own premises, of which he could not deprive him by the previous erection. But if the first mill was supplied by a stream of water which had been accustomed from time immemorial to flow in a particular channel, the owner of the second mill could not divert the stream from its accustomed channel, although done, on his own land, so as to deprive the first mill of its necessary supply of water. The diverting of the water in such a case would be a legal injury to the owner of the first mill; because it would deprive him of the natural right, which was paramount to the right of his neighbor, to an artificial use of water. . . . The same principles appear to have been applied to injuries arising to the owner of the lot by the artificial use of an adjacent lot by its owner. I have a natural right to the use of my land in the situation in which it was placed by nature, surrounded and protected by the soil of adjacent lots. And the owners of those lots will not be permitted to destroy my land by removing this natural support or barrier. Thus it is laid down by Rolle, that I may sustain an action against a man who digs a pit on his own land so near to my lot that my land falls into his pit.[19] But my neighbor has a right to dig a pit upon his own land, if necessary to its convenient or beneficial use, when it can be done without injury to my land in its natural state."[20]

Light Co., 122 N. Y. 18, 33, 25 N. E. 246, 9 L. R. A. 711, 33 N. Y. St. R. 246, per Haight, J., in dissenting opinion.

As to *damnum absque injuria*, see Broom's Leg. Max. (7th Amer. ed., 1874), p. 196 * 197, *et seq.*, § 32 herein. As to lawful, etc., use, see §§ 33-35 herein.

19. Citing 2 Rol. Abr. 565, 1, 10.

20. Lasala v. Holbrook, 4 Paige's Ch. (N. Y.), 169, 171, 172, 25 Am. Dec. 524.

§ 31. **Right to reasonably improve property.**—A person has the right to make reasonable improvements on his own premises where the owner of adjacent premises does not possess any special privileges, protecting him from the consequences, either by prescription or by grant from the person making the improvement, or from those under whom he claims title.[21] A man has also the right to improve his own property in any way he sees fit providing the improvement is not such a one as the law will pronounce a nuisance and the size and quality of the improvement never of themselves constitute it a nuisance, if the improvement itself is legitimate and lawful and not *per se* a nuisance. And an improvement which is not a nuisance, and which does not endanger the physical health and comfort of a neighbor will not be restrained on the ground that it is annoying and disagreeable to such neighbor, or because it does not correspond in kind and character with improvements on such neighbors' premises or because it would bring a different class of people socially into immediate proximity with the neighbor.[22] The principles above considered under the maxim *sic utere,* etc., reasonable or unreasonable, lawful or unauthorized use of property, and also the question of *damnum absque injuria,* are also applicable as to improvements.

§ 32. **Damnum absque injuria.**[23]—Every man is entitled to the ordinary and natural use and enjoyment of his own property, and if whilst lawfully in such use and enjoyment, without negligence or malice on his part, an unavoidable loss occurs to his neighbors, it is *damnum absque injuria,* for the rightful use of one's own land may cause damage to another, without any legal wrong.[24] So a man may do many things under a lawful authority, or in his own land, which may result in an injury to the property of others, without being answerable for the consequences. Indeed an act done under lawful authority, if done in a proper manner, can never subject the party to an action whatever consequences may follow. A man may enjoy his

21. Lasala v. Holbrook, 4 Paige's Ch. (N. Y.), 169, 25 Am. Dec. 524.

22. Falloon v. Schilling, 29 Kan. 207, 44 Am. Rep. 642.

23. See, also, §§ 24, 27-29, herein.

24. Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 146, 57 Am. Rep. 445, 6 Atl. 453, per Clark, J.

land in the way such property is usually enjoyed, without being answerable for the indirect or consequential damages which may be sustained by an adjoining landowner.[25] It follows that the maxim *sic utere*, etc., is undoubtedly to be so limited in its application as not to restrain the owner of property from a prudent and reasonable exercise of his right of dominion. If in the exercise of his right, another sustains damage it is *damnum absque injuria*,[26] for in the matter of things and society, it is not reasonable that every annoyance should constitute an injury such as the law will remedy or prevent. One may therefore make a reasonable use of his right, though it may create some annoyance or inconvenience to his neighbor. But even in such case, an annoyance lawful in itself may become unlawful when done maliciously.[27] The rightful use of one's own estate may not infrequently have some effect to diminish the value of an adjoining estate or to prevent its being used with the comfort which might have been otherwise anticipated. This, however, is *damnum absque injuria*, for which the law does not and cannot make compensation.[28] In a Nevada case it is said: "Every person has the reasonable enjoyment of his own property, and so long as the use to which he devotes it violates no rights of another, however much damage others may sustain therefrom, his use is lawful."[29] And in a New York case the court says: "The wants of mankind demand that property be put to many and various uses and employments, and one may have upon his property any kind of lawful business, and so long as it is not a nuisance, and is not managed so as to become such, he is not responsible for any damage that his neighbor accidentally and unavoidably sustains. Such losses the law regards as *damnum absque*

25. Radcliff's Exctrs. v. Mayor, etc., of Brooklyn, 4 N. Y. (4 Comst.), 195, 200, 203, 53 Am. Dec. 357, per Bronson, C. J.

26. Gardner v. Heartt, 2 Barb. (N. Y.), 165, 168, per Harris, J.

27. Powell v. Bentley & Gerwig Fur. Co., 34 W. Va. 804, 809, 12 L. R. A. 53, 12 S. E. 1085, per Holt, J.

28. Gerrish v. Proprietors of Union Wharf, 13 Shep. (26 Me.), 384, 392, 46 Am. Dec. 568, per Shepley, J.

29. Bliss v. Grayson, 24 Nev. 422, 454, 455, 56 Pac. 231, per Massey, J., citing 1 Wood on Nuis., p. 3.

See, also, same words in Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 33, 25 N. E. 246, 9 L. R. A. 711, 33 N. Y. St. R. 246, per Haight, J., in dissenting opinion.

injuria. [30] Again, an allegation in a bill that the erection and operation of a brewery or the business carried on there would result in the transportation, over tracks of a street railway company, of a largely increased quantity of merchandise past plaintiff's residence, said company being licensed to carry freight, was held to be the ground of demurrer and without force as the additional annoyance to persons residing on the line would clearly be *damnum absque injuria.*[31]

§ 33. Lawful or unauthorized, reasonable or unreasonable use of property.[32]—In determining whether or not a nuisance exists by reason of the use of one's own property to the injury or damage of another the unauthorized, unreasonable uses thereof are material factors. *Prima facie* a person may enjoy and use his own property as he chooses, but this is subject to the restrictions embodied in the maxim *sic utere,* etc., and such enjoyment and use must be lawful and reasonable and not unauthorized or unreasonable. The general principle that one cannot recover for lawful acts done by another on his own property without negligence and without malice is well founded in law. So long as the use to which one chooses to devote his own property violates no rights of others he is not liable, [33] and generally a person ought not to recover damages resulting to his own land from the lawful and reasonable use by another of his own adjoining land.[34] But the use must be reasonable having in view others' rights.[35] So, if one cultivates his land in the usual, ordinary and reasonable way, equity ought not to restrain him in such use whether his land is on a plain or so elevated above that of his neighbor's as to cause the soil to wash

30. Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 25, 25 N. E. 246, 9 L. R. A. 711, 33 N. Y. St. R. 246, per Brown, J.

31. O'Reilly v. Perkins, 22 R. I. 364, 48 Atl. 6.

32. See §§ 26-29, 32, herein.

33. Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 25, 33, 25 N. E. 246, 9 L. R. A. 711, 33 N. Y. St R. 246, per Brown, J., and per Haight, J., in dissenting opinion.

See, also, Bliss v. Grayson, 24 Nev. 422, 455, 56 Pac. 231, per Massey, J.; Campbell v. Seaman, 63 N. Y. 568, 577.

34. Quinn v. Chicago, Burlington & Quincy R. Co., 63 Iowa, 510, 19 N. W. 336.

35. Hurlburt v. McKone, 55 Conn. 31, 42, 10 Atl. 164, 4 N. Eng. 81, 3 Am. St. Rep. 17.

down and injure the latter's property.[36] Many circumstances may conspire to determine what is a proper use of one's own property. Some things are unlawful or nuisances *per se;* others because so only in respect to the time, place and manner of their performance. A person ought to know, when he erects a building or other structure upon his premises, what effect the use thereof will produce upon adjoining buildings and their inmates; he must, therefore, be presumed to have intended that which he might reasonably suppose would result. If, in view of such knowledge, it is not reasonable that an erection should be located so near a dwelling house of another as to seriously injure the occupants, then it cannot be said that the business carried on therein is or was reasonable and lawful.[37] To live comfortably is the chief and most reasonable object in the acquirement of property by men, so that any material interference with one's neighbor in the comfortable enjoyment of life is a wrong which should be redressed.[38] The first object of society and the laws, should be to protect life, health and property, and the right to their comfortable enjoyment; and from the earliest times the common law has considered them paramount to the mere convenience of doing a lawful act, or pursuing a lawful calling, in a particular place, so that whatever essentially, injuriously and necessarily affects life, health and property must be a wrong.[39] Again, the maxim *sic utere,* etc., is not of universal application; for, as a general rule, the man who exercises proper care and skill may do what he will with his own property. He may not, however, under color of enjoying his own, set up a nuisance which deprives another of the enjoyment of his right. A man must so exercise a lawful authority, and so enjoy his own property as not to injure that of another.[40] So it is said in a Massachusetts

36. Middlesex County v. McCue, 149 Mass. 103, 21 N. E. 230, 14 Am. St. Rep. 402 (a case of a bill to restrain defendant from filling up plaintiff's mill-pond).

37. Whitney v. Bartholomew, 21 Conn. 213, 217, 219, per Church Ch. J.

38. Wahle v. Reinbach, 76 Ill. 322, 326, 327, per Scholfield, J.

See, also, Hurlburt v. McKone, 55 Conn. 31, 10 Atl. 164, 3 Am. St. Rep. 17, 4 N. Eng. 81.

39. Whitney v. Bartholomew, 21 Conn. 213, 218, per Church, Ch. J.

40. Radcliff's Exctrs. v. Mayor, etc., of Brooklyn, 4 N. Y. (4 Comst.), 195, 198, per Bronson, Ch. J.

case that: "It is a common principle of the civil and of the common law, that the proprietor of land, unless restrained by covenant or custom, has the entire dominion, not only of the soil, but of the space above and below the surface, to any extent he may choose to occupy it. The law, founded upon principles of reason and common utility, has admitted a qualification to this dominion, restricting the proprietor so to use his own, as not to injure the property or impair any actual existing rights of another. . . . But this subjection of the use of a man's own property to the convenience of his neighbor is founded upon a supposed pre-existing right in his neighborhood to have and enjoy the privilege which by such act is impaired;" [41] and in a New York decision it is declared that a person must not use his own property so as to injure another, if he obviously can, with reasonable care, and without unreasonable effort or expense to avoid it. "The question is one of relative obligation or duty, and the violation of this duty is negligence." [42] So, in a Maine case, the court says: "What is a nuisance? In considering this question when the complaint is based upon the use by another of his own property, we are first met by the general doctrine of the right of every man to regulate, improve and control his own property; to make such erections as his own judgment, taste or interest may suggest; to be master of his own without dictation or interference by his neighbors. On the other hand, we meet that equally well established and exceedingly comprehensive rule of the common law—'*sic utere tuo, ut alienum non laedas*'—which is the legal application of the gospel rule of doing unto others as we would that they should do unto us. The difficulty is in drawing the line in particular cases, so as to recognize and enforce both rules within reasonable limitations. . . . No man is at liberty to use his own without any reference to the health, comfort or reasonable enjoyment of like public or private rights by another. . . . This illegal, unreasonable and justi-

41. Thurston v. Hancock, 12 Mass. 220, 224, 7 Am. Dec. 57n., per Parker, C. J.

42. Dunsbach v. Hollister, 49 Hun (N. Y.), 352, 354, 17 N. Y. St. R. 461, 2 N. Y. Supp. 94, aff'd 132 N. Y. 602, 44 N. Y. St. R. 934, 30 N. E. 1152.

fiable use to the injury of another, or of the public, the law denominates a nuisance." [43]

§ 34. **Lawful or unauthorized, reasonable or unreasonable use of property continued.**—If the use of one's own property is unauthorized or unreasonable and produces a tangible, appreciable and material injury, hurt, annoyance, inconvenience, discomfort, or damage to his neighbor or others it constitutes a nuisance for which there is a liability and consequent damage in the law. What, however, is a reasonable use of one's own property cannot be defined by any precise technical rule as it must be governed largely by the circumstances of each case, having in view the locality, the character or kind of nuisance charged, and of the act, trade, business, etc., producing it and various other facts.[44] Under a Pennsylvania decision it is said that a man is to be protected in the enjoyment of his property against all unlawful disturbances, if he does not by such enjoyment invade the rights of others and if he disturbs in an unreasonable degree the quiet enjoyment of a home or dwelling house it constitutes a nuisance.[45] The following language used by the court in an English case is also pertinent: "In Ball v. Ray,[46] Lord Selborne, L. C., said: . . . 'If houses adjoining are so built that from the commencement of their existence it is manifest that each adjoining inhabitant was intended to enjoy his own property for the ordinary purposes for which it and all the different parts of it were constructed, then so long as the house is so used there is nothing that can be regarded in law as a nuisance which the other party has a right to prevent. But, on the other hand, if either party turns his house, or any portion of it, to unusual purposes in such a manner as to produce a substantial injury to his neighbour, it appears to me that that is not according

43. Barnes v. Hathorn, 54 Me. 124, 126, per Kent, J. See, also, dissenting opinion, id., p. 130.

44. Hoadley v. Seward & Son Co., 71 Conn. 640, 646, 42 Atl. 997, per Andrews, C. J.

See, also, Hurlburt v. McKone, 55 Conn. 31; Campbell v. Seaman, 63 N. Y. 568, 576.

St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642, 35 L. J. Q. B. 66, 13 W. R. 1083, 12 Law T. 776, 11 Jur. N. S. 785.

45. Wallace v. Auer, 10 Phila. (Pa.), 356-358, per Allison, P. J.

46. L. R., 8 Ch. 467, 469.

to principle or authority a reasonable use of his own property; and his neighbor, showing a substantial injury is entitled to protection.' Reinhard v. Mentasti [47] was cited, in which Kekewitch, J., is reported to have said that 'notwithstanding some passages in some judgments to the contrary, the application of the principle governing the jurisdiction of the court in cases of nuisance does not depend on the question whether the defendant is using his own reasonably or otherwise.' I prefer to guide myself by the judgment of Lord Selborne to the effect that the court must consider whether the defendant is using his property reasonably or not. If he is using it reasonably, there is nothing which at law can be considered a nuisance; but if he is not using it reasonably, if he is using it for purposes for which the building was not constructed, then the plaintiff is entitled to relief." "The defendant must not unreasonably use his premises so as sensibly to annoy his neighbor." [48] But in another English case it is declared that if the nuisance complained of is to the house or land of a person, and, having in view all the circumstances including the nature and extent of plaintiffs' enjoyment before the act complained of, the annoyance is sufficiently great to amount to a nuisance according to the ordinary rule of law, whatever the locality may be, and the act complained of is done on the land of defendant, the jury cannot properly be asked whether the causing the nuisance was a reasonable use by defendant of his own land.[49] Again, instructions to a jury should not be such that they may fairly infer that the erection complained of was not a nuisance because the act of defendant in making such erection was but a reasonable use of his own property where the building alleged to be a nuisance was so built, kept or used as to destroy the comfort of persons owning and occupying adjoining premises and to impair their value as places of habitation, for in such case a nuisance exists. So if the adacent proprietors be annoyed by such erection in any manner, which could be

47. 42 Ch. D. 685, 690.

48. Sanders-Clark v. Grosvenor Mansions Co. Ltd. (1900), 2 Ch. 373, 374, 375, 69 L. J. Ch. 579, 580, 581, 82 L. T. N. S. 758, 48 Wkly. Rep. 570, per Buckley, J.

49. Bamford v. Turnley, 3 Best. & S. 62, 113 Eng. C. L. 61. Pollock, C. B. *dissentiente*. This case is considered in Campbell v. Seaman, 63 N. Y. 568, 579, 20 Am. Rep. 567, per Earl, J.

avoided, it becomes an actionable nuisance, even though such structure or building in itself be a convenient and lawful erection.[50] So formerly an action on the case lay for a nuisance to the habitation or estate of another; and the rule applied if a man erected anything offensive so near the house of another that it becomes useless thereby, as a swine stye, a lime-kiln, a dye house, a privy, a brewhouse, a tan-fatt, a smelting house, or a smith's forge.[51]

§ 35. **Lawful or unauthorized, reasonable or unreasonable use of property—Conclusion.**—If the act done is lawful and carried on reasonably and does not interfere with health, comfort or the ordinary uses and enjoyment of property in the neighborhood it cannot be a nuisance in fact or in anticipation.[52] Generally there can be no recovery of damages resulting from the lawful and reasonable use by one of his own property; otherwise where there is some unlawful or unreasonable use or sufferance as in case of allowing water to remain without excuse on one's lot so that it percolated through the soil to his neighbor's injury.[53] But it cannot be said that the use of one's property is reasonable and lawful where he knows or ought to know that such use will injure materially his neighbors' rights and it does so injure them.[54] And a "reasonable" nuisance has no existence in law. If a man carries on his business so as to create a nuisance he is acting unreasonably.[55] So the doing of an act in the ordinary and obvious manner is not necessarily doing it in a reasonable and proper manner.[56] And the fact that an act is lawful if properly done does not prevent its becoming a nuisance where it is so negligently done as to materially annoy and cause discomfort to the inmates of a dwelling house.[57] This rule is also applicable to a trade or business as

50. Dargan v. Waddill, 31 N. C. (9 Ired. L.), 244, 247, 49 Am. Dec 421.

51. 1 Comyn's Dig. 418, 419 (A).

52. Rhodes v. Dunbar, 57 Pa. 274, 290, 98 Am. Dec. 221.

53. Quinn v. Chicago B. & Q. R. Co., 63 Iowa, 510, 19 N. W. 336.

54. Whitney v. Bartholomew, 21 Conn. 213, 217, 219, per Church, Ch. J.

55. Attorney-General v. Cole, 70 L. J. Ch. 148, 83 L. T. 725 (1901), 1 Ch. 205, 65 J. P. 88.

56. Stockport Waterworks Co. v. Potter, 7 H. & N. 160, 31 L. J. Ex. 9, 7 Jur. N. S. 880.

57. Dunsbach v. Hollister, 49 Hun

will appear in the chapter on that subject, since, although a business is lawful, if it invades private rights and impairs comfort and enjoyment, it is to that extent unlawful.[58] Again, although the purposes for which an erection is used are lawful and it be built upon one's own land, yet if it is so constructed or used as to render life uncomfortable to those living in the neighborhood it is a nuisance, for equity will on proper showing restrain one from so using this property as to injure another.[59] And so, although a lawful act properly done cannot be treated as a nuisance *per se*, yet it may be so done as to be a nuisance or the surrounding circumstances may make it one.[60]

§ 36. Easements of light and air—Prospect—General doctrine.—In order to determine whether or not a nuisance exists by reason of the obstruction of light and air it is proper to consider the doctrine governing these easements. Generally immemorial uses, grant, covenant, contract, or statute are necessary to unobstructed light or air over a neighbor's land.[61] And such easements may exist under an express grant, covenant, or agreement,[62] or by reservation in a deed.[63] So, under a covenant, a perpetual easement to light and air may be retained by a grantor to land abutting

(N. Y.), 352, 17 N. Y. St. R. 461, 2 N. Y. Supp. 94, 132 N. Y. 602, 44 N. Y. St. R. 934, 30 N. E. 1152.

See, also, Hurlbut v. McKone, 55 Conn. 31, 10 Atl. 164, 4 N. Eng. 81.

58. Pennoyer v. Allen, 56 Wis. 502, 512, 43 Am. Rep. 728, 14 N. W. 609, per Cassoday, J.

59. Kasper v. Dawson, 71 Conn. 405, 410, 42 Atl. 78, per Hall, J.

60. Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 420, 421, 47 N. E. 2, 62 Am. St. Rep. 532, 37 L. R. A. 381.

61. Chastey v. Ackland (1895), 2 Ch. 389, 64 L. J. Q. B. N. S. 523, 72 L. T. N. S. 845.

See, also, Kennedy v. Burnap, 120 Cal. 488, 52 Pac. 843, 40 L. R. A. 476.

62. Keating v. Springer, 146 Ill. 481, 493, 34 N. E. 895, 22 L. R. A. 544, 37 Am. St. Rep. 175; Janes v. Jenkins, 34 Md. 1, 6 Am. Rep. 300; Ladd v. Boston, 151 Mass. 585, 21 Am. St. Rep. 481, 24 N. E. 858 (easement of light, air and prospect may exist by covenant between owneres of lots bounded on a square); Salisbury v. Andrews, 128 Mass. 336 (right existed to have open court and light and air under provisions in a deed); Muzzarelli v. Hulshizer, 163 Pa. 643, 30 Atl. 291 (deed with building restriction in nature of covenant held to create easement of light and air).

63. Hagerty v. Lee, 54 N. J. L. 580, 20 L. R. A. 631, 25 Atl. 319.

on a private alley.[64] Such easements for existing windows and doors of a building may also exist to an ordinary or limited extent when created by a will providing for the continuance, unchanged as far as possible, of a mansion house estate with an annexed open space.[65] So easements of light and air may attach as an appurtenance when reasonably essential to the beneficial enjoyment of a building, and also when at the time of the interchange of cross conveyances between tenants in common, upon severance of the parcel upon which the building stood, such easements were apparent as well as continuous.[66] This principle has been also recognized in other cases.[67] But, subject to these and other decisions of like tenor, the conveyance of a building by the owner of adjacent lots does not impliedly pass an easement of light and air, even though the erection of buildings on such lots will greatly impair the value and also the enjoyment of the building conveyed.[68] In an English case, however, decided in 1824, the principle is asserted that if a man erect on a part of his land a house, having

64. Metropolitan West Side Elevated R. Co. v. Springer, 171 Ill. 170 9 Am. & Eng. R. Cas. N. S. 731, 49 N. E. 416. See Brooks v. Reynolds, 106 Mass. 31, a case where a grantee had the right to the open and unobstructed passage of light and air from the ground upwards and throughout the length of a passageway. This case is distinguished in Grafton v. Moir, 130 N. Y. 465, 473, 42 N. Y. St. R. 373, 27 Am. St. Rep. 533, 29 N. E. 974, 9 W. N. Supp. 3.

65. Baker v. Willard, 171 Mass. 220, 40 L. R. A. 754, 50 N. E. 620. The court, per Allen, J., said: "We find no satisfactory evidence to show that the testator sought to create any further protection or advantage to the mansion house estate, in regard to light and air, than the ordinary easement of that kind . . . An implied grant of an easement is not to be extended by construction beyond what was necessary, or what is fairly shown to have been within the intention of the creator of it."

66. Greer v. Van Meter, 54 N. J. Eq. 270, 33 Atl. 794.

67. Kennedy v. Burnap, 120 Cal. 488, 52 Pac. 843, 40 L. R. A. 476; Robinson v. Clapp, 65 Conn. 365, 29 L. R. A. 582, 32 Atl. 939; Turner v. Thompson, 58 Ga. 268, 272-275, 24 Am. Rep. 497; Bloom v. Koch, 63 N. J. Eq. 10, 50 Atl. 62. See White v. Bradley, 66 Me. 254; Jones v. Jenkins, 34 Md. 1, 6 Am. Rep. 300; Doyle v. Lord, 64 N. Y. 432, 439, 21 Am. Rep. 629; Rennyson's Appeal, 94 Pa. St. 147, 39 Am. Rep. 777; Powell v. Sims, 5 W. Va. 1, 7, 13 Am. Rep. 629.

Compare Keating v. Springer, 146 Ill. 481, 493, 37 Am. St. Rep. 175, 34 N. E. 805, 22 L. R. A. 544.

68. Kennedy v. Burnap, 120 Cal. 488, 40 L. R. A. 476, 52 Pac. 843.

the comfort of windows, for the purpose of enjoyment and habitation, and grant to another person an interest in that house, he cannot afterwards do upon his adjoining property that which as against a stranger would be a nuisance. He cannot do anything in prejudice of his own grant and if the consequence of making alterations on the demised premises or of erecting intended buildings thereon will be to destroy the comfortable enjoyment of the house and render it unwholesome the act will clearly constitute a nuisance both on the principles of law and equity.[69] Under the English Prescription Act an absolute and indefeasible right to light for a dwelling house, workshop or other building may be acquired by actual enjoyment thereof for twenty years without interruption.[70] It is declared, however, that the right to air is not an

See Robinson v. Clapp, 65 Conn. 365, 383, 29 L. R. A. 582, 32 Atl. 939; Turner v. Thompson, 58 Ga. 268, 24 Am. Rep. 497; Keating v. Springer, 146 Ill. 481, 493, 37 Am. St. Rep. 175, 34 N. E. 805, 22 L. R. A. 544; Ray v. Sweeney, 14 Bush. (Ky.), 1, 29 Am. Rep. 388; Mullen v. Stricker, 19 Ohio St. 135, 2 Am. Rep. 379; Rennyson's Appeal, 94 Pa. St. 147, 39 Am. Rep. 777; Examine Christ Church v. Lavezzolo, 156 Mass. 89, 30 N. E. 471; Bloom v. Koch, 63 N. J. Eq. 10, 50 Atl. 62; Powell v. Sims, 5 W. Va. 1, 7, 13 Am. Rep. 629.

See, also, Morrison v. Marquardt, 24 Iowa, 35, 58-67, 92 Am. Dec. 444. By the ruling in this case, it seems, though not expressly decided, that the English doctrine that if one sells a house he cannot afterwards build, etc., is not applicable here. See White v. Bradley, 66 Me. 254 (*quaere*).

69. Palmer v. Paul, 2 L. J. O. S. (Ch. Cas.), 154, 157.

70. Clifford v. Holt (1899), 68 L. J. Ch. N. S. 332.

See, also, Jordan v. Sutton, Southcoates & Drypool Gas Co., 67 L. J. Ch. N. S. 666, 673, 674; Gale v. Abbott, 6 L. T. R. N. S. 852, 8 Jur. N. S. 987, 10 Wkly. Rep. 748; Hall v. Leichfield Brewery Co., 49 L. J. Ch. 655, 43 L. T. R. 380, N. S. 384. See Collins v. Laugher (1894), 3 Ch. 659, 63 L. J. Ch. 851, 43 Wkly. Rep. 202; Bonner v. Great Western Ry. Co., 48 L. T. Rep. N. S. 619, 24 Ch. D. 1, 32 W. R. 190, 47 J. P. 580.

Compare Wheaton v. Maple & Co. (1893), 3 Ch. 48, 62 L. J. Ch. 903, 2 R. 549, 41 W. R. 677, 69 L. T. 208.

"If the owner of adjacent land erects a building so near the house of the plaintiff as to prevent the air and light from entering and coming through the plaintiff's windows, an action will, in some cases, lie. The law on this subject formerly was, that no action would lie, unless a right had been gained in the lights by prescription; but it was subsequently held, that, upon evidence of an adverse enjoyment of lights for twenty years or upwards unexplained, a jury might be directed to presume a right by grant or other-

easement under the English Prescription Act; but that, although it does not apply to air, a right to have it come over another's land, in some definite direction to some particular place, can probably be established by what is called immemorial user, or by user which may have had for its origin some lost grant or agreement

wise, even though no lights had existed there before the commencement of the twenty years; and although, formerly, if the period of enjoyment fell short of twenty years, a presumption in favor of the plaintiff's right might have been raised from other circumstances, it is now enacted by 2 and 3 Will. 4, c. 71, § 6, that no presumption shall be allowed or made in support of any claim upon proof of the exercise of the enjoyment of the right or matter claimed for less than twenty years; and by § 3 of the same statute, that 'when the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years, without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.' And by § 4, it is further enacted, that 'the period of twenty years shall be taken to be the period next before some suit or action wherein the claim shall have been brought into question; and no act or matter shall be deemed to be an interruption within the meaning of the statute, unless the same shall have been submitted to, or acquiesced in, for one year after the party interrupted shall have had notice thereof, and of the person making or authorizing the same to be made.'" Broom's Legal Maxims (7th Amer. ed., 1874), 380, 381 * 381 * 382.

In Kelk v. Pearson, L. R., 6 Ch. 809, 19 Wkly. Rep. 665, 24 L. T. Rep. N. S. 890, decided in 1871, it is held that the statute (2 and 3 Will. 4, c. 71), altered in no degree whatever the pre-existing law as to the nature and extent of the right; that since the statute, as before the statute, it is simply a question of degree, and whether the light is used for the purposes of business or a residence, the rule is the same, that it is sufficient that the easement cannot be enjoyed in as full and ample a manner as before, or that the premises to a sensible degree are less fit for the purposes of business or habitation; that the owner of an ancient light is entitled to prevent his neighbor from obstructing the access of light, so as to render the house possessing the ancient light substantially less fit for habitation. This case is approved of in Warren v. Brown, L. R. (1902), 1 K. B. 15, 71 L. J. K. B. 12, 50 Wkly. Rep. 97, 85 L. T. 444, as to the question of degree and a right to relief for substantial interference; and Romer, L. J., says: That since this case of Kelk v. Pearson "it is impossible to hold properly that the statutory right is not interfered with merely because after the interference

binding on the owners of the servient tenement.[71] But mere length of time does not, in the absence of the acquirement of some adverse legal right, enable one to acquire the enjoyment, as against his neighbor, of the right to have an unobstructed passage of light and air through the windows of his home.[72] And in the United States the courts, with certain early exceptions, have not recognized or at least have rejected the English doctrine of ancient lights or that an easement of unobstructed passage of light and air over another's land may be acquired by user or prescription.[73] In a New York

the house may still come up to some supposed standard as to what a house ordinarily requires by way of light, for purposes of inhabitancy or business." He also says: "The statute in its terms might appear to sanction the view that the right to light once acquired was absolute as to every part of it, so that any interference however slight would be wrongful. But it was soon established that the statute had not altered the character of the right, though it had altered the method by which it could be acquired; and it was held that the right would not be interfered with if there were no substantial diminution of the light such as to cause substantial damage to the tenant or owner. And, in considering what would be a substantial diminution and substantial damage, it is held that the proper point of view is to pay regard, not to what some person having fantastic or peculiar views might choose to regard as a substantial diminution or as substantial damage, but to the views of persons of ordinary sense and judgment. And, in particular, in considering whether a house has been substantially injured, it is proper to have regard to the ordinary uses by way of habitation or business to which the house has been put, or might reasonably be supposed to be capable of being put . . . And at the present day, if ancient lights are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief," and the plaintiffs were held entitled to damages for substantial interference with ancient lights and the uses of their premises for the purpose of a special business requiring a special quantity of light. There is much analogy between the reasoning in the opinion in this case and the underlying principles governing nuisances.

71. Chastey v. Ackland (1895), 2 Ch. 389, 402, 64 L. J. Q. B. 523, 72 L. T. N. S. 845, per Lindley, L. J.

72. Bailey v. Gray, 53 S. C. 503, 516, 31 S. E. 354, per McIver, C. J.

73. Jesse French Piano & Organ Co. v. Forbes, 129 Ala. 471, 477, 87 Am. St. Rep. 71, 29 So. 683; Kennedy v. Burnap, 120 Cal. 488, 490, 40 L. R. A. 476, 52 Pac. 843; Ingwersen v. Barry, 118 Cal. 342, 50 Pac. 536; Turner v. Thompson, 58 Ga. 268, 270, 24 Am. Rep. 497; Mitchell v. Rome, 49 Ga. 19, 15 Am. Rep. 669; Kotz v. Illinois Cent. R. Co., 188 Ill. 578, 583, 59 N. E. 240; Keating v. Springer, 146 Ill. 481, 492, 22 L. R. A. 544, 34 N. E. 805, 37 Am. St. Rep.

case it is said that the English rule in regard to ancient lights has been repudiated in that state and generally throughout the country and that under the rule prevailing there an owner of property may place windows in the walls of his house though they overlook his

175; Stein v. Hauck, 56 Ind. 65, 26 Am. Rep. 10, 1 R. St. 1876, p. 436 (considered in this connection); Lapere v. Luckey, 23 Kan. 534, 538, 33 Am. Rep. 196; Ray v. Sweeney, 14 Bush. (Ky.), 1, 29 Am. Rep. 388; White v. Bradley, 66 Me. 254, 264, per Barrows, J.; Cherry v. Stein, 11 Md. 1; Keats v. Hugo, 115 Mass. 204, 208-213, 15 Am. Rep. 80; Hayden v. Dutcher, 31 N. J. Eq. 217; Doyle v. Lord, 64 N. Y. 432, 439; Parker v. Foote, 19 Wend. (N. Y.), 309; Meyers v. Gemmel, 10 Barb. (N. Y.), 537; Mullen v. Stricker, 19 Ohio St. 135, 2 Am. Rep. 379; Haverstick v. Sipe, 33 Pa. St. 368; Bailey v. Gray, 53 S. C. 503, 515, 31 S. E. 354; Klein v. Gehrung, 25 Tex. Suppl. 232, 78 Am. Dec. 565; Hubbard v. Toun, 33 Vt. 295; Tunstall v. Christian, 80 Va. 1, 4, 56 Am. Rep. 581, per Lewis, P.; Powell v. Sims, 5 W. Va. 1, 7, 13 Am. Rep. 629. See Goodwin v. Alexander, 105 La. 658, 30 So. 102; Pierre v. Fernald, 13 Shep. (26 Me.), 436, 46 Am. Rep. 473; Milnes' Appeal, 81 Pa. St. 54; Hoy v. Sterret, 2 Watts (Pa.), 327, 331, 27 Am. Dec. 313; Napier v. Bulwinkle, 5 Rich. (S. C.), 311; Washburn on Real Prop. (6th ed.), § 1281; 3 Blackstone's Comm. (Cooley), * 216, note 1.

Compare Gerber v. Grabel (1854), 16 Ill. 217; Fifty Associates v. Tudor, 6 Gray (Mass.), 255; Robeson v. Pittenger (1838), 2 N. J. Eq. 57, 32 Am. Dec. 412; Mahan v. Brown (1835), 13 Wend. (N. Y.), 261, 28 Am. Dec. 461.

In Clawson v. Primrose, 4 Del. Ch. 643, dated 1873, it is held that the English doctrine of presumptive title to light and air, received over land of another person, arising from the untinterrupted enjoyment of it for twenty years and upward, through the window of a dwelling house, was part of the common law of England and of the colonies at the period of American Independence, and as such construed to be the law of Delaware under its constitution adopted at the organization of the State government in 1776.

Under a decision given not later than 1843, it was held that a party has no right to build so near his neighbor as to immediately obstruct the passage of light and air; but the mere tendency to obstruct the free passage of the one or the other is not sufficient to warrant the restraining process of a court of equity, and the court said that "it can scarcely be asserted that the right to the enjoyment of a free circulation of air belongs to a citizen of a large town. The circulation of air is obstructed and confined in every city in proportion as it is compactly built." The case turned, however, upon the difference between an erection which is in itself a nuisance and one which may prove so according to circumstances and also upon the point that complainant had not stated a case from which direct and unavoidable injury would result to him, but had merely shown a

neighbors' land; and that it will not do for a man to build to the extreme end of his lot, and then complain because his rear neighbor, in exercising the same privilege, has cut off the light, air, or prospect he formerly enjoyed.[74] And in Louisiana it is declared that a servitude of light and air through windows in a wall cannot be acquired by prescription against the owner of the adjacent lot unless he is able to assert the right to have them closed.[75] But even though the right to have unobstructed light over another's land could be presumed from long acquaintance in its enjoyment which would thereby ripen into a title and presuppose a grant nevertheless if there is a recent erection by one of a house on the margin of a town or city lot with a window opening upon an adjoining proprietor's lot, that person does not by such erection acquire such a right to the use of his window as to preclude the adjacent proprietor from exercising his right to build on his lot in any manner his fancy or judgment may dictate provided the building is not a nuisance and is constructed with a due regard to the safety of others.[76] The stopping of a prospect is no nuisance.[77] So it is declared in an early English case that an action on the case lies for obstructing air and light but not for obstructing a prospect, as both light and air are necessary while a prospect is a matter of delight

state of things from which injury might or might not result, according to the circumstances, and demurrer to the bill was sustained. Gwin v. Melmoth, 1 Freem. Ch. (Miss.), 505. See last preceding section herein.

The law with respect to ancient lights had reference only to the cases where the owner of such lights had acquired a title against the owner of adjoining property by an actual or presumed grant. It happens sometime, though not often, that ancient lights were protected by an actual grant; more frequently they depended upon a presumed grant; for if the owner of adjoining ground permitted his neighbor the use of a window for twenty years, the law presumeed that he had granted to him the use of it. Palmer v. Paul, 2 Law J. O. S. 154, 157 (Ch. Cas.).

See, further, as to ancient lights and easements of light and air notes: 7 Am. Dec. 49-53; 41 Am. St. Rep. 323-329; 22 L. R. A. 536-543.

74. Levy v. Samuel, 23 N. Y. Supp. 825, 826, 4 Misc. 48, per McAdam, J.

75. Oldstein v. Foreman's Building Assoc., 44 La. Ann. 492, 10 So. 928.

76. Ray v. Lynes, 10 Ala. 63.

77. Knowles v. Richardson, 1 Mod. * 55 (case 109).

only and not of necessity.[78] Another general principle is that an owner of property abutting on a street has a right to remuneration for an injurious interference with or interruption of light from the street as the free enjoyment of these easements is necessary to a beneficial use of the property.[79] Again, the obstruction of light and air in connection with other factors of injury may constitute a nuisance. Thus the construction, over an alleyway appurtenant to a building and upon which it abutted, of a room with a stairway leading down, closing up exits and cutting off light and ventilation and blockading the free use of the way and creating offensive and unhealthful odors by cooking, to the injury of another tenant is a nuisance for which a mandatory injunction may be granted.[80] If there is such an obstruction of light and air as justifies a remedy it may be restrained even though the injured party could make other openings and so supply the deficiency created by such obstruction.[81] In England unless the right to have air come over the land of another has been acquired by lapse of time the mere

78. Aldred's Case, 9 Coke, 57b, 58b, per Wray, C. J.

79. Pond v. Metropolitan Elevated Ry. Co., 42 Hun (N. Y.) 567, 4 N. Y. St. R. 661, rev'd 112 N. Y. 186, 20 N. Y. St. R. 479, 19 N. E. 487, upon the ground that permanent depreciation cannot be recovered in an action of the character before the court, and it was said that the principle was established that an abutting owner on streets in New York city, possesses as one incident to such ownership, easements of light, air and access in and from the adjacent streets for the benefit of his abutting lands, and that the appurtenant easements constitute private property, of which he cannot be deprived, without compensation. See, also, Kotz v. Illinois Central R. Co., 188 Ill. 578, 582, 59 N. E. 240; Case v. Minot, 158 Mass. 577, 22 L. R. A. 536, 33 N. E. 700. See Kane v. New York Elevated R. Co., 125 N. Y. 164, 34 N. Y. St. R. 876, 11 L. R. A. 640, 26 N. E. 278; Abendroth v. Manhattan Elevated Co., 122 N. Y. 1, 33 N. Y. St. R. 475, 25 N. E. 496, aff'g 54 N. Y. Supp. 417, 19 Abb. N. C. 247, 7 N. Y. St. R. 43, which rev'd 52 N. Y. Super. 274.

"The abutting owners of property on a public street have as good right to the free enjoyment of the easements of light and air as they have of their property itself. Without the free enjoyment of these easements they could have no beneficial use of their property." Chicago G. W. Ry. Co. v. First Methodist Episcopal Church (U. S. C. C. A.), 102 Fed. 85, 91, 50 L. R. A. 488, per Caldwell, C. J.

80. Shroyer v. Campbell, 31 Ind. App. 83, 67 N. E. 193.

81. Clawson v. Primrose, 4 Del. Ch. 643.

diminution of quantity is not a nuisance in law, but damages may be received for an interference with ancient lights.[82]

§ 37. **Doctrine of easements of light and air applied to nuisances—Easement of view.**—It would seem to logically follow from the definition of a nuisance and also from the premises stated under the last section that the obstruction of light and air over another's land will not constitute a nuisence as to one in whom no such right or easement exists and that such a nuisance can only exist as to one in whom there is an easement of light and air. Thus a fence erected on one's own land is not a nuisance though it obstructs a neighbor's light, in the absence of an acquired right by grant, occupation or acquiescence.[83] But a fence erected for no useful purpose and which shuts off another's light and air is a nuisance when erected solely for a malicious purpose.[84] A coal and wood house being a building erected for a useful purpose is not a nuisance though it darkens another's windows.[85] In the absence of an adverse right by prescription, grant or otherwise, the owner has a right to make erections upon his own land which will have the effect to deprive an adjacent owner of light and air to his house and also to obstruct his view, and such structure, unless made of offensive material will not constitute a nuisance for which an action will lie.[86] And the darkening of another's windows or depriving him of a prospect where no right to an unobstructed light exists, invades no legal right and gives no right of action, even though it impairs the enjoyment and value of another's property,[87] nor does the mere fact that a building prevents air from

82. Chastey v. Ackland (1895), 2 Ch. 389, 64 L. J. Q. B. 523, 72 L. T. N. S. 845.

83. Mahan v. Brown, 13 Wend. (N. Y.), 261, 28 Am. Dec. 461. This case recognizes ancient lights. Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177.

84. Peek v. Roe, 110 Mich. 52, 67 N. W. 1080; Flaherty v. Moran, 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183, 21 Am. St. Rep. 510. Compare Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177.

85. Kuzniak v. Kozminski, 107 Mich. 444, 61 Am. St. Rep. 344, 65 N. W. 275, 2 Del. L. N. 713, 28 Chicago Leg. News, 166.

86. Honsel v. Conant, 12 Ill. App. (12 Bradw.) 259, 260.

87. Pickard v. Collins, 23 Barb. (N. Y.), 444, 458. This case recognizes a right to light by prescription.

circulating so as to carry off noisome or bad smells, constitute a nuisance as to a neighbor where the smells arise on the latter's premises.[88] So, where growing trees are maintained along a boundary line, they do not constitute a nuisance because the branches extend over plaintiff's land and injure fruit trees by their shade.[89] The obstruction of light from the street may, however, constitute a nuisance as to owner of property abutting thereon.[90] So, an obstruction of a New York city street which deprives plaintiff, who occupies an adjoining building, of light and air to a considerable extent at all times and entirely cuts off the view of his premises from the other side of the street is such a nuisance as justifies an injunction.[91] So, that if no express covenant exists upon which such a right can be based, no action can be maintained for obstructing or interfering with a view.[92] And no right of action exists because the view is obstructed by screens or adjacent land where by opening the window shutters the light and air will be unobstructed.[93] And the facts that a view of the sea and the gulf breeze is shut off, thereby tending to depreciate the value of the property, do not constitute the erection of a private residence a nuisance.[94]

§ 38. **Right to pure and fresh air.**— The people of a community are entitled to pure, fresh, untainted, unpolluted, uncontaminated, inoffensive air, and every person is entitled to a necessary supply and reasonable use thereof for himself and family for the ordinary

88. Chastey v. Ackland (1895), 2 Ch. 389, 64 L. J. Q. B. N. S. 523.

89. Grandona v. Lovdal, 78 Cal. 611, 21 Pac. 366, 12 Am. St. Rep. 121; other factors of claimed injury were, however, also considered.

90. Townsend v. Epstein, 93 Md. 537, 52 L. R. A. 409, 49 Atl. 629, 86 Am. St. Rep. 441.

91. Lavery v. Hannigan, 52 N. Y. Super. (20 Jones & S.), 463.

92. Tompkins v. Harwood, 24 N. J. L. 425. Examine Re Penny, 7 Ell. & Bl. 660, 90 Eng. C. L. Rep. 660, where Lord Campbell, C. J., says: "I am clearly of opinion that he is not entitled to any compensation for the overlooking of his premises by the railway. It might as well be said that the owner of a house was entitled to compensation on account of the view from it, half a mile off, having been obstructed by the railway."

93. Taylor v. Boulware, 35 La. Ann. 469.

94. Quintin v. Bay St. Louis, 64 Miss. 483, 1 So. 625, 60 Am. Rep. 62.

purposes of breath and life. In determining to what degree the air should be fresh and pure, it should at least not be incompatible with the physical comfort of human existence; but the locality and the circumstances at the time should be considered.[95]

§ 39. **Extent and character of injury and damage generally.**— In an early case Chief Justice Holt, in distinguishing between a trespass and a nuisance,[96] said that "the gist of the action in a nuisance is the damage; and, therefore, as long as there are damages there is ground for an action."[97] In this connection it may be generally stated that if the continuance of a nuisance will necessarily work an injury or it is permanent in its character, continuing without change from any cause but human labor, then there is an original damage for which compensation may be given at once.[98] In another frequently cited English case, it is declared that in order to constitute a nuisance there must be not merely nominal, but such a sensible and real damage as a sensible person in the same situation would find injurious, but that which is a sensible and real inconvenience to property situate in one place, or occupied in one way, will be none to property situate in another place

95. State v. Luce, 9 Houst. (Del.) 396, 398, 32 Atl. 1076, per Comegys, Ch. J.; Ross v. Butler, 19 N. J. Eq. 294, 299, 300, 97 Am. Dec. 654; Walter v. Selfe, 15 Jur. 416, 419, 4 Eng. L. & Eq. 15, per Knight Bruce, V. C.; Rex v. Neil, 2 Carr. & P. 485, 690, per Abbott, C. J. See Eller v. Koehler, 68 Ohio St. 51, 67 N. E. 89, 12 Am. Neg. Rep. 659; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642, 644, 652, 35 L. J. Q. B. 66, 13 W. R. 1083, 12 L. T. 776, 11 Jur. N. S. 785, per Lord Wensdale, in opinion, and per Mr. Justice Mellor in charge to jury. Saville v. Kilner, 26 Law T. N. S. 277, 279.

The owner of adjoining premises "retains his right to have the air that passes over his land pure and unpolluted." Crump v. Lambert, L. R., 3 Eq. Cas. 409, 413, per Lord Romilly, M. R., quoted in Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 281, 25 Am. St. Rep. 595, 20 Atl. 900, 9 L. R. A. 737, per Robinson, J.

See, also, sections herein as to locality, as to trade and business, as to degree of injury or damage, public benefit or advantage and reasonable use of property.

96. See § 17 herein.

97. The Case of The Farmers of Hempstead Water, 12 Mod. * 510 (case 869).

98. Powers v. City of Council Bluffs 45 Iowa, 652, 24 Am. Rep. 792, quoting from Town of Troy v. Cheshire Rd. Co., 3 Fost. (N. H.), 83, per Bell, J.

or occupied in another way.[99] Many cases, however, are governed by the general principle that an action can be maintained where there is only an injury without actual damage, where such cases are not within the rule *damnum absque injuria,* but within the maxim *ubi jus ibi remedium.*[100] So, even though there is no actual damage, if a legal right has been invaded an action lies[101] in case of a private nuisance,[102] and if such violation is clear, damage may be presumed.[103] So, if a nuisance exists the law will infer damage,[104] and actual damage need not be proven.[105] Damages may also be merely nominal where the right and the invasion thereof are both clear;[106] and by analogy in cases of smoke, offensive or noisome odors or smells, and the like, a nuisance may exist where

99. Scott v. Firth, 4 Fost. & Fin. 349, 350, per Blackburn, J.

100. Parker v. Griswold, 17 Conn. 288, 42 Am. Dec. 739 (the principle being that every injury from its very nature imports damage. This case was an action for diversion of a watercourse); Blanchard v. Baker, 8 Me. 253, 23 Am. Dec. 504 (an action for diverting a watercourse. Proof of actual damage held unnecessary); Bolivar Mfg. Co. v. Nepouset, 16 Pick. (Mass.), 241 (action is maintainable for invasion of right to an easement without proof of actual damage as law presumes damage); Dorman v. Eames, 12 Minn. 451, Gilf. 347, 360, 361 (any infringement of a right is an injury for which an action will lie, and where such infringement is shown, though without proof of actual damage, nominal damages may be recovered for the injury); Webb v. Portland Mfg. Co., 3 Sumn. (U. S. C. C.), 189 (holding that actual perceptible damage is not indispensable as the foundation of an action. It is sufficient to show a violation of a right. The law will presume some damage in such a case); See generally Broom's Leg. Max. (7th ed. 1874), * 200 * 203.

101. Ashby v. White, 2 Ld. Raym. 938, 953-955, per Holt, C. J., who states and applies the general principle.

102. Freudenstein v. Heine, 6 Mo. App 287; Casebeer v. Mowry, 55 Pa. St. 419, 93 Am. Dec. 766; Delaware & Hudson Canal Co. v. Torrey, 33 Pa. St. 143, 16 Leg. Int. 189, 7 Am. L. Reg. 611. See Alexander v. Kerr, 2 Rawle (Pa.) 93, 19 Am. Dec. 616.

"Exciting, constant and reasonable apprehension of danger, although no actual injury has been occasioned, has been held to be a nuisance." Barnes v. Hathorn, 54 Me. 124, 127, 128, per Kent, J.

103. Casebeer v. Mowry, 55 Pa. St. 419, 93 Am. Dec. 766.

104. Adams Hotel Co. v. Cobb, Ind. Ty. 1899, 53 S. W. 478, 481.

105. Fay v. Prentice, 1 Mann. Gr. & S. 828, 50 Eng. C. L. * 828.

106. Ashby v. White, 2 Ld. Raym. 938, 953-955, per HOLT, C. J., who states, however, only the general principle. See also Donovan v. Ames, 12 Minn. 451, Gilf. 347, 360, 361.

material discomfort is produced.[107] But it is not any defense to an action for damages that the injury is not appreciable. The amount of damages is not the sole object of an action for the continuance of a nuisance. The right is the great question. One man cannot, with impunity, invade the premises of another by a nuisance because the damages may be inappreciable. The law allows the recovery of nominal damages at least as evidence of the plaintiff's right.[108] And no matter how slight the damage, the right of action exists as well for a slight as for a great injury.[109] So, a charge which makes the right of action depend upon whether the injury is theoretical, so far as its nature or extent is concerned, and not whether a substantial injury is nominal or great, is not erroneous.[110] Again, where a public right or privilege, common to every person in the community is interrupted or interfered with, a nuisance is created by the very act of interruption or interference, which subjects the party through whose agency it is done to a public prosecution, although no actual injury or damage may be thereby caused to anyone.[111] There must, however, ordinarily be an invasion of a right otherwise there is no nuisance.[112] But in an early case it is declared that some damage must be proved where damages are consequential and affect relative rights;[113] and also

107. Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201; Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Walter v. Selfe, 4 DeG. & S. 315, 15 Jur. 416, 20 L. J. Ch. 433.

108. Casebeer v. Mowry, 55 Pa. St. 419, 423, 93 Am. Dec. 766 (applied to flooding plaintiff's land); Humphrey v. Irvin (Pa.), 18 Wkly. N. C. 449, 451, 3 Sad. 272, 6 Atl. 479.

In a special action on the case for overflowing plaintiff's land, "In which the nature and the extent of the alleged injury are specially described in the declaration, the plaintiff is entitled to a verdict for nominal damages, though he fail to prove the particular injury complained of or any other actual injury." Syllabus in 1 Rawle (Pa.) 27, quoted in Humphrey v. Irvin (Pa.), 18 Wkly. N. C. 449, 451, 3 Sad. 272, 6 Atl. 479, 4 Cent. 687.

109. Cooper v. Randall, 53 Ill. 24.

110. Dorman v. Ames, 12 Minn. 451, Gilf. 347, 358.

111. Wesson v. Washburn Iron Co., 13 Allen (Mass.) 95, 102, 90 Am. Dec. 181, per Bigelow, C. J.

112. Fisher v. Clark, 41 Barb. (N. Y.) 329, 331; Pickard v. Collins, 23 Barb. (N. Y.) 444. Robert v. Les Cure et Marguilliers, etc., Rap. Jud. Quebec, 9 S. C. 489. See Mahan v. Brown, 13 Wend. (N. Y.) 261, 264, 28 Am. Dec. 461, per Savage, Ch. J.

113. Cropsey v. Murphy, 1 Hilt. (N. Y.) 126, 127, per Brady, J.

that the injury complained of must be direct and not merely consequential.[114] But, although in England a distinction is taken between direct and consequential damage, yet if a private person suffers some extraordinary damage beyond other citizens from a public nuisance, he is entitled to an action, even if his special damage be consequential.[115] So, the weight of authority, at the present day, sustains the position that it is sufficient to maintain a private action for the erection of a nuisance, upon a public highway, if there be peculior or special damage resulting therefrom, though consequential and not direct;[116] and the rule seems to be that recovery may be had for the injury where the damage is either direct or consequential.[117] In equity there must be both injury and damage to warrant an injunction;[118] and ordinarily a material or substantial injury or damage must be shown to justify granting such relief, otherwise the party will be left to his remedy at law, as a merely nominal injury or damage will not warrant the issuance of an injunction against a nuisance.[119] If a nuisance has, however, been established at law, and the damages recovered in such action are merely nominal and inadequate to prevent the repetition of an injury where the nuisance is of a continuous and constantly recur-

114. Gwin v. Melmoth, 1 Freem. Ch. (Miss.) 505, 507.

115. Pittsburgh v. Scott, 1 Pa. St. 309, 319, 320.

116. Baxter v. Winooski Turnpike Co., 22 Vt. 114, 122, 22 Am. Dec. 84.

117. Colstrum v. Minneapolis & St. Louis Ry. Co., 33 Minn. 516, 24 N. W. 255, Gen. Stat. 1878, c. 75, § 44.

Where a person suffers special damage, either direct or consequential from a nuisance he can recover. Adams Hotel Co. v. Cobb, Ind. Ty. 1899, 53 S. W. 478, 481.

Every person who suffers damages, whether direct or consequential from a common nuisance, may maintain an action for his own particular injury. Lansing v. Smith, 4 Wend. (N. Y.) 9, 25.

The damage need not be direct, it is sufficient that it is consequential. Hughes v. Heiser, 1 Bin. (Pa.) 463, 2 Am. Dec. 459.

118. Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221.

119. Clifton Iron Works v. Dye, 87 Ala. 468, 470, 6 So. 192, per Stone, C. J. Owen v. Phillips, 73 Ind. 284; Bernheimer v. Manhattan Ry. Co., 13 N. Y. Supp. 913, 26 Abb. N. C. 88; Salvin v. North Brancepeth Coal Co., L. R. 9 Ch. 705, 44 L. J. Ch. 149, 31 L. T. 154, 22 W. R. 904.

See Smith v. Ingersoll-Sergeant Rock Drill Co., 33 N. Y. Supp. 70, 12 Misc. 5, reversing 27 N. Y. Supp. 907, 7 Misc. 374.

ring nature, a court of equity will interfere and grant relief.[120] And the amount of the damage measured by a money standard will be immaterial in equity, where it is sought to restrain the continuance of a nuisance *per se* by mandatory injunction, such nuisance being an injury to a right.[121] Again, upon a bill for an injunction, the court said that one of the questions was whether or not, upon the balance of the conflicting evidence, sufficient evidence of the actual injury to plaintiff existed to justify its interference. If there was, it was the duty of the court to protect the plaintiff against what, upon evidence of such injury, would be a wrongful act.[122]

§ 40. **Impairment of, or diminution in value of property.**—Impairment of, or diminution in value of property, occasioned by a nuisance, may be a proper factor in considering an application for an injunction, or as a ground for maintainance of an action,[124] and is an element of damages,[125] or is the measure or limitation thereof in some cases.[126] Depreciation in value may also be considered as an element of damages in connection with other elements,[127] and also in cases of permanent

120. Paddock v. Somes, 102 Mo 226, 240, 10 L. R. A. 254, 14 S. W. 746.

121. Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

122. Beardmore v. Tredwell, 7 L. T. N. S. 207, 208, 3 Giff. 683, 31 L. J. Ch. 892, 9 Jur. N. S. 272.

123. See § 41 herein.

124. Owen v. Phillips, 73 Ind. 284, 294; Quinn v. Chicago, Burlington & Quincy R. Co., 63 Iowa, 510, 19 N. W. 336.

125. Quinn v. Chicago, Burlington & Quincy R. Co., 63 Iowa, 510, 19 N. W. 336; Givens v. Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421, 4 Mo. App. 498; Babb v. Curators of University of State of Missouri, 40 Mo. App. 173; Stevenson v. Ebervale Coal Co., 203 Pa. 316, 52 Atl. 201, 201 Pa. 112, 50 Atl. 201, 88 Am. St. Rep. 805; Daniel v. Fort Worth & R. G. Ry. Co., 96 Tex. 327, 72 S. W. 578.

126. Elizabethtown, Lexington & Big Sandy R. Co. v. Combs, 10 Bush. (73 Ky.) 382, 19 Am. Rep. 67; Stevenson v. Ebervale Coal Co., 203 Pa. 316, 52 Atl. 201, 201 Pa. 112, 50 Atl. 818, 88 Am. St. Rep. 805.

Missouri, K. & T. Ry. Co. v. McGehee, Tex. Civ. App. 1903, 75 S. W. 841; Daniel v. Fort Worth & Rio Grande R. Co., Tex. Civ. App. 1902, 69 S. W. 198. See Hockaday v. Wortham, 22 Tex. Civ. App. 419, 54 S. W. 1094; Houghton v. Bankhard, 3 Law T. N. S. 266.

127. Givens v. Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421; Givens

injury,[128] and it is sufficient that there has been, or is, a substantial impairment or depreciation in value;[129] although it must be such an injury as to visibly diminish the value of property.[130] And upon the question of the real value of the property, and also whether or not its impaired value was due entirely to the alleged injuries, it may be shown that other causes than those alleged, contributed to such impairment of value.[131] It is also sufficient that the nuisance is calculated directly to diminish the value of property for building lots,[132] for the fact that the property injured consists of vacant building lots does not preclude recovery, such fact being only a circumstance bearing upon the nature and extent of the damage.[133] But it is also decided that, in order to create a nuisance, it is not enough that it diminishes the value of surrounding property, that it renders other property unsalable,

v. Van Studdiford, 4 Mo. App. 498; Buckman v. Green, 9 Hun (N. Y.) 225, 229, 230; Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. Ed. 739, 2 Sup. Ct. 719. (Holding that the question of damages does not rest simply upon the depreciation of property alleged to be injured, but upon other factors also.)

128. Kanakee & Seneca R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621; Smith v. Point Pleasant & Ohio River R. Co., 23 W. Va. 451; Missouri, Kansas & Texas Ry. Co. v. McGehee, Tex. Civ. App. 1903, 75 S. W. 841, See Robb v. Carnegie, 145 Pa. 324, 27 Am. St. Rep. 694, 22 Atl. 649, 14 L. R. A. 329. Compare Barrick v. Schifferdecker, 123 N. Y. 52, 33 N. Y. St. R. 485, 25 N. E. 365, rev'g 48 Hun, 355, 16 N. Y. St. R. 449, 1 N. Y. Supp. 21; Van Veghten v. Hudson River Power Transmission Co., 92 N. Y. Supp. 956; Thayer v. Brooks, 17 Ohio, 489, 493, 49 Am. Dec. 474. As to continuing nuisance generally, see Pinney v. Berry, 61 Mo. 359; City of Mansfield v. Hunt, 19 Ohio Cir. Ct. R. 488, 11 Ohio C. D. 567.

129. Campbell v. Seaman, 2 Thomp. & C. (N. Y.) 231, aff'd 63 N. Y. 568, 20 Am. Rep. 567; Cropsey v. Murphy, 1 Hilt. (N. Y.) 126, 127, per Brady, J.; Ryan v. Copes, 11 Rich. L. (S. C.) 217, 73 Am. Dec. 106 (a case of a threatened peculiar danger alleged to have occasioned loss by depreciation of property and annoyance of litigation).

130. St. Helens Smelting Co. v. Tipping, 11 Jur. N. S. 735, 11 H. L. Cas. 642, 13 W. R. 1083, 35 L. J. Q. B. 66, 12 L. T. 776.

131. Stevenson v. Ebervale Coal Co., 201 Pa. St. 112, 50 Atl. 818, 88 Am. St. Rep. 805.

132. Peck v. Elder, 3 Sandf. (N. Y.) 126, 129, per Chancellor Walworth, S. C. See Baltimore City v. Fairfield Improvement Co., 87 Md. 352, 359, 40 L. R. A. 494, 39 Atl. 1081, 67 Am. St. Rep. 344. See Dane v. Valentine, 5 Metc. (Mass.) 8.

133. Ruckman v. Green, 9 Hun (N. Y.), 225, 229.

or that it prevents one from letting his premises for as large a rent as before, or to as responsible tenants. It must be such a use as produces a tangible or appreciable injury, or, as to render its enjoyment essentially uncomfortable or inconvenient.[134] So, it is said in a Texas case that "depreciation in value of plaintiff's property, and of its use, was the natural and necessary consequence of the nuisance; but the failure of plaintiff to sell his property at a price greater than he will be able to sell it for after the nuisance is abated, is not a natural or necessary consequence of it."[135] But, although it may be true, as a general rule, that such acts as result in a mere diminution of the value of property, which can be fully and readily compensated in damages, will not supply grounds for an injunction, and parties will be left to the redress afforded by an action for damages,[136] nevertheless impairment of value may constitute a ground for equitable relief,[137] where an existing or threatened nuisance has, or will seriously and materially impair the value of property and interfere with its ordinary comfort and enjoyment.[138] But although damage to private property may be, it is not necessarily a ground of equitable relief,[139] as a mere depreciation in value of such property by a

134. Flood v. Consumers' Co., 105 Ill. App. 559, 562, per Burke, J. See Canal Melting Co. v. Columbia Park Co., 99 Ill. App. 215. Compare, however, Ruckman v. Green, 9 Hun (N. Y,). 225, 229, 230.

135. Commings & Geisler v. Stevenson, 76 Tex. 642, 645, 135 S. W. 646.

136. Owen v. Phillips, 73 Ind. 284, 294, per Elliott, J.

137. Adams v. Ohio Falls Car Co., 131 Ind. 375, 31 N. E. 57; Baltimore v. Fairfield Improvement Co., 87 Md. 352, 359, 360, 40 L. R. A. 494, 39 Atl. 1081, 67 Am. St. Rep. 344. Goldsmid v. Tunbridge Wells Improvement Commissioners, 35 C. J. Ch. 382, 384, 12 Jur N. S. 308, 14 W. R. 562, L. R. 1 Ch. 349, 14 L. T. 154, where it is said that regard must be had to the effect of the nuisance upon the value of the estate and the prospect of dealing with it to advantage, in granting relief by injunction, per Lord Justice Turner. See Houghton v. Bankhard, 3 L. T. N. S. 266. See generally Schaidt v. Blaul, 66 Md. 141, 6 Atl. 669, 5 Cent. 580.

138. Adams v. Michael, 38 Md. 123, 17 Am. Rep. 516. See, also, Baltimore v. Fairfield Improvement Co., 87 Md. 352, 40 L. R. A. 494, 39 Atl. 1081.

139. Haggart v. Stehlin, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577, (holding that nuisance existed to private property, and that complaint for damages and an injunction stated

nuisance is not a sufficient foundation for such relief without irreparable injury;[140] but an action for damages may lie.[141] The character of the injury may, however, be such as to even preclude evidence of the diminished value of property as in case of a street obstruction,[142] or the operation of a bakery, and the averments of the declaration may be such that evidence will be inadmissible to enhance the damages by showing that the value of property has been diminished by offensive odors.[143] So, mere diminution in value may operate as *damnum absque injuria,* invading no legal right, and not of itself constitute a nuisance; and in cases of unquestioned public nuisance mere diminution in value of the property of a complainant, alleging special injury, by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief.[144] So, there may be no such impairment of a legal right as to constitute a nuisance even though the value of property is depreciated.[145] Nor does a nuisance exist under circumstances which would operate to deprive one of the use of property without compensation, even though the alleged injurious act might have a tendency to diminish the value of plaintiff's property.[146] And the fact that a steamboat line, established before a railroad, between the same termini, was built, has its traffic thereby diverted and the

good cause of action); Stillwell v. Buffalo Riding Academy, 21 Abb. N. C. (N. Y.) 472, 4 N. Y. Supp. 414, (a case of erection of building, but not given over to injurious use). See Harrison v. Good, L. R. 11 Eq. 338, 353, 40 L. J. Ch. 294, 19 W. R. 346, 24 L. T. 203.

140. Shivery v. Streeper, 24 Fla. 103, 3 So. 865; Canal Melting Co. v. Columbia Park Co., 99 Ill. App. 215; Halsey v. Rapid Transit Street R. Co., 47 N. J. Eq. 380, 20 Atl. 859, 46 Am. & Eng. R. Cas. 76; Zabriskie v. Jersey City & Bergen R. Co., 13 N. J. Eq. 314; Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221. See Nelson v. Milligan, 151 Ill. 462; Robb v. Carnegie, 145 Pa. 324, 14 L. R. A. 329, 22 Atl. 649, 27 Am. St. Rep. 694.

141. Haggart v. Stehlin, 137 Ind. 43, 22 L. R. A. 577, 35 N. E. 997.

142. Hopkins v. Western Pac. R. Co., 50 Cal. 190.

142a. Alexander v. Stewart Bread Co., 21 Pa. Super. Ct. 526.

143. Johnson v. Porter, 42 Conn. 234.

144. Morris & Essex Rd. Co. v. Prudden, 20 N. J. Eq. 530, 537; Zabriskie v. Jersey City & Bergen Rd. Co., 13 N. J. Eq. 314. Examine Harrison v. Good, L. R. 11 Eq. 338, 24 L. T. 263, 40 L. J. Ch. 294, 19 W. R. 346.

145. Pickard v. Collins, 23 Barb. (N. Y.) 444.

146. Quintini v. Bay St. Louis, 64 Miss. 483, 491, 1 So. 625.

use and enjoyment of its property depreciated, does not make such railroad a private nuisance even though it was wrongfully constructed on State property.[147]

§ 41. **Depreciation in or diminished rental value.**—An act which depreciates or diminishes the rental value of premises may constitute a nuisance,[148] and such diminished rental value may be recovered, and is an element of damages, or the measure thereof according to the circumstances,[149] as other elements may also be considered.[150] So, evidence is admissible to show such depreciation of rental value,[151] although it is decided that such depreciation

147. Old Forge Co. v. Webb, 57 N. Y. App. Div. 636, 68 N. Y. Supp. 1145, affg. 65 N. Y. Supp. 503, 31 Misc. 316.

148. McKeon v. See, 4 Rob. (N. Y.) 449.

149. City of Eufaula v. Simmons, 86 Ala. 515, 6 So. 47, (measure of damages); Holbrook v. Griffis, Iowa, 1905, 103 N. W. 479, (rule in temporary nuisance as to meausre of damages); Hollenbeck v. City of Marion, 116 Iowa, 69, 89 N. W. 210 (measure of damages); Shively v. Cedar Rapids, Iowa Falls & Northwestern R. Co., 74 Iowa, 169, 7 Am. St. Rep. 471, 37 N. W. 133 (measure of damages); Givens v. Van Studdiford, 86 Mo. 149, 56 Am. Rep. 44 (proper element of damages); Francis v. Schoelkopf, 53 N. Y. 153 (measure of damages); Peck v. Elder, 3 Sandf. (N. Y.) 126, 129 (per Chancellor Walworth, S. C.); Garrett v. Wood, 55 N. Y. App. Div. 281, 67 N. Y. Supp. 122 (measure of damages); Michel v. Munroe County Supervisors, 39 Hun (N. Y.), 47, 48 ("Seems to be a just measure of damages" for polluting waters of ditch); Beir v. Cooke, 37 Hun (N. Y.), 38 (difference between rental value free from and subject to nuisance recoverable); Herbert v. Rainey, 162 Pa. 525, 34 W. N. C. 494, 29 Atl. 725 (entire rental value recoverable); Commings & Geisler v. Stevenson, 76 Tex. 642, 13 S. W. 646 (rental value is measure of damages); Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241 (where tenements are lessened in value suit lies to restrain nuisance). See Langfeldt v. McGrath, 33 Ill. App. 158; Wesson v. Washburn Iron Co., 13 Allen (95 Mass.), 95, 100, 90 Am. Dec. 181; Bly v. Edison Electric Illuminating Co., 172 N. Y. 1, 58 L. R. A. 500, 64 N. E. 745, rev'g 54 N. Y. App. Div. 427, 66 N. Y. Supp 737; Joyce on Damages, § 2150. Compare Gempp v. Bassham, 60 Ill. App. 84.

150. Loughram v. City of Des Moines, 72 Iowa, 382, 34 N. W. 172; City of Mansfield v. Hunt, 19 Ohio Cir. Ct. R. 488, 10 Ohio C. D. 567.

151. Swift v. Broyles, 115 Ga. 885, 425 E. 277 (proof of depreciation in rental value a proper guide); Savannah, Florida & Western Ry. Co. v. Parish, 117 Ga. 893, 45 S. E. 280; Hollenbeck v. City of Marion, 116

tion must be alleged in order to admit proof thereof;[152] but the recovery is limited as to time or duration.[153] Diminution in rental value may, however, be an insufficient basis of recovery or damages.[154] And where the injury is not tangible or appreciable it is held not enough that the alleged nuisance prevents one from letting his premises for as large a rent as before or to as responsible tenants.[155]

§ 42. **No distinction of classes.**—The law knows no distinction of classes and extends its protection to any citizen or class of citizens against wrongs and grievances even though others might perhaps endure them without suffering discomfort. This principle applies to nuisances,[156] and there is no principle in law, or the reasons on which its rules are founded, which should give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer, and their families, the fewer and more restricted comforts which they enjoy.[157]

§ 43. **Rule that motive or intent unimportant and exceptions to or qualifications thereof.**[157a]—Generally the motives of parties cannot be inquired into where they have been exercising their legal rights or where the act is legal in itself;[158] and where one has not been deprived of a legal right whether the motives of the defendant are good or bad

Iowa, 69, 89 N. W. 210; Chamberlain v. Missouri Electric Light & Power Co., 158 Mo. 1, 57 S. W. 1021; Umscheid v. City of San Antonio, Tex. Civ. App. 1902, 69 S. W. 496. See Pettit v. Town of Grand Junction (Iowa, 1903), 93 N. W. 381.

152. Potter v. Froment, 47 Cal 163.

153. See Joyce on Damages, § 2150. See, also, chapter herein on measure of damages.

154. Gilson v. Donk, 7 Mo. App 37; Ross v. Butler, 19 N. J. Eq. 274 97 Am. Dec. 654. See Smith v. Phillips, 8 Phila. (Pa.) 10.

155. Flood v. Consumers' Co., 105 Ill. App. 559, 562, per Burke, J.

156. Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201, 206.

157. Ross v. Butler, 19 N. J. Eq. 294, 306, 97 Am. Dec. 654, per The Chancellor.

157a. See § 94, herein, as to trade or business.

158. People v. Albany & Susquehanna Rd. Co., 57 Barb. (N. Y.) 204, 219, 2 Lans. 459, case affirms 8 Abb. N. S. 132, 39 How. 49, and is affd. 57 N. 161. The question involved here, however, was an appeal from an order at special term to set

is unimportant.[159] So, in determining whether or not a nuisance has been committed the motive or intent with which defendant did the act complained of will not be considered. If a nuisance is created by his acts it is immaterial how innocent the intent was for the element of motive or intent does not enter into the question of nuisance, otherwise the maxim *sic utere tuo ut alienum non laedas* would be unwarrantably limited.[160] So, in an English case the court says: "'It has been contended that to render the defendant liable, it must be his object to create a nuisance, or else that that must be the necessary and inevitable result of his act. No doubt it was not his object; but I do not agree with the other position, because if it be the probable consequence of his act he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result he will be answerable for it.'"[161] If an improvement, such as the erection of buildings, is in itself legitimate and lawful, and not *per se* a nuisance, the fact that the erection is from spite will not subject the party making such erection to restraint by the courts, the law will not inquire into the motives with which he acts, provided he keeps within the limits of legal action.[162] So a wrong and unlawful motive in erecting a building otherwise lawful, does not make the building itself a nuisance.[163] If a building is so located that it injures another by shutting off his light, and is erected for a use-

aside all proceedings upon an "alleged judgment" directing a receiver in relation to possession of certain property, etc. Chatfield v. Wilson, 28 Vt. 49 (a case only of underground waters..

159. Mahan v. Brown, 23 Wend. (N. Y.) 261, 28 Am. Dec. 461.

"The current of the authorities seems to be, that if any one does a lawful act on his own property the motive for the act is in law a matter of indifference." Medford v. Levy, 31 W. Va. 649, 654, 13 Am. St. Rep. 887, 8 S. E. 302, 2 L. R. A. 368.

160. People v. Burtleson, 14 Utah, 258, 263, 47 Pac. 87, per Bartch, J.; Bonnell v. Smith & Bro., 53 Iowa, 281, 5 N. W. 1281, the court said: "The best intentions cannot prevent an act from being a nuisance where it otherwise is such, and the worst intentions cannot make an act a nuisance where it otherwise is not."

161. Walker v. Brewster, L. R. 5 Eq. Cas. 25, 33 per Sir W. Page Wood, V. C., quoting Lord Tenterdon in Rex v. Moore, 3 B. & Ad. 184.

162. Falloon v. Schilling, 29 Kan. 292, 296, 297, 44 Am. Rep. 642.

163. Chenango Bridge Co. v. Paige, 83 N. Y. 178, 188, per Earl J. Depierris v. Mattern, 10 N. Y. Supp. 626.

ful purpose, the fact that it was located from spite or malicious motives is of no consequence,[164] otherwise where a structure serves no useful purpose but is erected solely from malicious motives.[165] Again, the liability of defendant in erecting a fence which obstructs plaintiff's light ought not to depend upon the motive with which such erection was made, as bad motives in doing an act cannot constitute a ground of action where such act violates no legal rights of another.[166] So, upon the question whether the keeping of bees is a nuisance, the issue is not as to defendant's motives nor as to their knowledge of any vicious propensities of the bees, but whether under the existing condition of things, then and before, a nuisance existed.[167] Where there has been no attempt to show, and it is not claimed, that defendant's acts in constructing a dam above a certain height were wilfully committed, evidence offered by defendant to show that such acts were not wilful, is inadmissible.[168] And when plaintiff shows a public nuisance, with special damage to himself, his motives in filing the bill, or in prosecuting his suit, cannot be inquired into.[169] If a statute expressly specifies a certain act as constituting a nuisance when a prejudice to others, it is immaterial whether the defendant intended the prejudicial result to others or not, if such result flows from his unlawful acts, as every man is presumed to intend the natural and probable consequences of his act.[170] So, where a city ordinance aims to prevent a nuisance by prohibiting certain acts, the intent with which the prohibited act is done is immaterial.[171] Where, however, a statute provides than an injunction may issue against the malicious erection of any structure intended to annoy and injure the proprietor of adjacent land in respect to his use or disposition

164. Kuzniak v. Kozminski, 107 Mich. 444, 61 Am. St. Rep. 344, 65 N. W. 275, 28 Chicago Leg. News, 166, 2 Det. L. N. 713.

165. Flaherty v. Moran, 81 Mich. 52, 21 Am. St. Rep. 510, 8 L. R. A. 183, 45 N. W. 381.

166. Pickard v. Collins, 23 Barb. (N. Y.) 444, 459.

167. Olmstead v. Rice, 6 N. Y. Supp. 826, 828, 25 N. Y. St. R. 271, 53 Hun, 638 (mem.).

168. Finch v. Green, 16 Minn. 355 (Gilf. 315).

169. Lippincott v. Lasher, 44 N. J. Eq. 120, 14 Atl. 103. The question of motive arose upon the point of costs or fees.

170. Secord v. The People, 121 Ill. 623, 13 N. E. 194.

171. Brady v. Steel & Spring Co., 102 Mich. 277, 26 L. R. A. 175, 60 N. W. 687.

thereof, the malicious intent must be so predominating as a motive as to give character to the structure. It must be so manifest and positive that the real usefulness of the structure will be as manifestly subordinate and incidental; the structure intended by the statute must be one which from its character, location or use must strike the ordinary beholder as manifestly erected with the leading purpose to annoy the adjoining owner or occupant in his use of his premises.[172] So, it must be shown in conformity with the statute, that the controlling motive in erecting a fence was that of annoyance.[173] But it is not necessary that any criminal intent whatever should exist to convict one of a nuisance. If a person creates and maintains a public nuisance, he is guilty of the offense even though he has done so with the best intentions.[174] And it is decided that a master, or owner of works, carried on for his profit by his agents or servants, is liable to be indicted for a public nuisance caused by acts of his workmen in carrying on the works, though done by them without his knowledge and contrary to his general orders.[175] It is held, however, that motive or intent may be important; thus while under certain circumstances, the doing of certain things by a person in the use of his premises as a dwelling house would not amount to a private nuisance, yet when such things are done for the wilful or malicious purpose of annoying a neighbor, and they have such effect and render the latter's home uncomfortable, and destroy its peace and quiet, the doing may amount to a nuisance which will be restrained by a court of equity.[176] So, where the jury found that a brew house and privy were maliciously erected to deprive the plaintiff of the benefit of his habitation and office and that the plaintiff was thereby damaged, judgment was given for the plaintiff.[177] Again, the question of motive or intent

172. Gallagher v. Dodge, 48 Conn. 387, 40 Am. Rep. 182.

173. Hunt v. Coggin, 66 N. H. 140, 20 Atl. 250, under Laws 1887, c. 91.

174. Taylor v. People, 6 Parker's Crim. Rep. (N. Y.) 347, 351.

175. Queen v. Stephens, 7 B. & S. 710, 12 Jur. N. S. 961, L. R. 1 Q. B. 702, 14 L. T. 593, 14 W. R. 859, 10 Cox C. C. 340. See Peachey v. Rowland, 22 L. J. C. P. 81, 13 C. B. 182, 17 Jur. 764; Barnes v. Akroyd, L. R. 7 Q. B. 474, 41 L. J. M. C. 110, 26 L. T. 692, 20 W. R. 671.

176. Medford v. Levy, 31 W. Va. 649, 656, 13 Am. St. Rep. 887, 2 L. R. A. 368, 8 S. E. 302.

177. Jones v. Powell, 1 Hutton, 135, 136.

may be important where equitable relief is sought by a party in case of a public nuisance, for it is held that an injunction ought not to be granted where the benefit secured by it to one party is but of little importance, while it will operate oppressively to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrongdoer of the benefit of any consideration as to its injurious consequences.[178] The intention might also be a proper subject of inquiry upon the question of exemplary damages.[179]

§ 44. **Negligence—Care, reasonable care or precaution or want thereof.**—Negligence of the defendant is not ordinarily an essential element in an action for damages sustained by reason of a nuisance. The action is founded on the wrongful act in creating or maintaining it, and the negligence of the defendant, unless in exceptional cases, is not material.[180] So, as a general rule, the question of care or want of care, is not involved in an action for injuries resulting from a nuisance;[181] and the exercise of reasonable care in the creation or maintenance of a nuisance can never be an absolute defense to an action for an injury occasioned thereby.[182] So, it is said in a New York case: That "no degree of care will excuse the creator of a nuisance, and for that reason negligence is generally not regarded as a factor in such case, though, as these torts are frequently coexistent, it is at times difficult to suppress the appearance of negligence, or evidence given to explain away its presence."[183] Again, one who habitually and knowingly

178. Morris & Essex Rd. Co. v Prudden, 20 N. J. Eq. 530, 540. See Akers v. Marsh, 19 App. D. C. 28 46, where the court, in discussing grounds for relief by injunction against an alleged nuisance, said there was nothing in the evidence to show that the alleged act was wilfully done or done with a malicious motive of annoying plaintiff.

179. Bonnell v. Smith & Bro., 53 Iowa, 281, 5 N. W. 1281.

180. Lamming v. Galusha, 135 N. Y. 239, 242, 47 N. Y. St. R. 831, 832, 31 N. E. 1024, per Andrews, J., case reverses 63 Hun, 32, 43 N. Y. St. R. 592, 22 C. P. 16, 17 N. Y. Supp. 328.

181. Laflin & Rand Powder Co. v. Tearney, 131 Ill. 322, 325, 19 Am. St. Rep. 34, 23 N. E. 389, 7 L. R. A. 262, per Magruder, J. Holding also that an objection that the declaration does not charge defendant with negligence is not well taken.

182. Wilkinson v. Detroit Steel & Spring Works, 73 Mich. 408, 418, 41 N. W. 490.

183. Pitcher v. Lennon, 74 N. Y.

permits filthy water from a barn manure vault to percolate or filter constantly into his neighbor's well and cellar, is liable in damages for the injury without other proof of negligence; for a person should use reasonable precautions to exclude filthy water, from his vault, from injuring his neighbor's land and property, and not to do so is negligence, there being no pretence of unavoidable accident which could not have been foreseen or guarded against with due care.[184] And where it becomes one's duty to do an act in such a manner as not to injure his neighbor's property, as in case of closing a drain to prevent an overflow of adjoining land, he is bound to use ordinary care, and he is not responsible for such overflow where he exercises such care.[185] But an occupier of land is under no duty toward his neighbor periodically to cut the thistles naturally growing on his land so as to prevent them from seeding; and if, owing to his neglect to cut them, the seeds are blown on his neighbor's land and do damage, he is not liable.[186] So, unless a party can show a right either in the nature of a presumed grant, or in some other mode, to use his property in a particular way, he cannot use it in that particular way if it occasions injury to his neighbors in the quiet enjoyment of their legal rights and privileges, and if such use constitutes a nuisance, it is no vindication that proper precautions were used to prevent the injury.[187] But a thing which may lawfully be done may, because of the manner of doing it, become unlawful, and a person may do a lawful act so carelessly or unskillfully as to be guilty of a nuisance, and an habitual failure to perform a duty may constitute a nuisance or the doing of a thing habitually, without the reasonable and necessary precautions to secure the public safety may be an indictable nuisance.[188] So a private sewer may be so negligently constructed

St. R. 817, 38 N. Y. Supp. 100, 16 M. 609, per McAdam, J.; case aff'd 12 N. Y. App. Div. 356, 42 N. Y. Supp. 156.

184. Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56 (an action of tort alleging injury to plaintiff's cellar and well, by wilfully and negligently causing and permitting filthy water from a barn vault to be discharged into said cellar and well, tainting the water and rendering the cellar unwholesome).

185. Rockwood v. Wilson, 11 Cush. (65 Mass.) 221.

186. Giles v. Walker, L. R. 24 Q. B. D. 656.

187. Scott v. Bay, 3 Md. 431, 445, 446, per Mason, J.

188. L. & N. R. R. Co. v. Common-

as to constitute a private nuisance,[189] and a house may be kept so negligently and in such a filthy condition as to be a nuisance.[190] The manner of conducting a business may also make it a nuisance.[191] So, an act which is not a nuisance *per se* may be so negligently done as to become a nuisance. Negligence, therefore, must be shown in cases of such character to entitle plaintiff to recover damages,[192] for, as will appear hereafter under the proper headings, there are certain cases in which negligence must be averred in order to recover for the alleged nuisance. But the neglect of the State to keep a public dam in good preservation does not take away its public character or authorize its destruction by individuals as being a public nuisance.[193]

§ 45. Contributory negligence—Prevention of injury or damage by plaintiff.—It is a general rule, ordinarily applicable, that the law of contributory negligence has no place in an action to recover damages for a nuisance.[194] The doctrine of contributory negligence implies the wrongful act or omission of the party sought to be charged, and does not apply to a case of nuisance created by plaintiff himself and of his own volition or in conjunction with others upon his own lot.[195] So, although a party may have contributed of that which is a nuisance, within the meaning of a statute,[196] he may, nevertheless, lawfully make complaint thereof. This rule was applied in a case of the escape of sulphuretted hydrogen gas from a sewer, and Quain, J., said: "The circumstance that the respondents ought to take steps to abate a nuisance, does not justify the appellants in creating it."[197] So it is no de-

wealth, 13 Bush (Ky.), 388-390, 26 Am. Rep. 205, per Cofer, J.

189. Adams Hotel Co. v. Cobb, Ind. Ty. 1899, 53 S. W. 478.

190. State v. Purse, 4 McCord (S. C.), 472.

191. Barkau v. Knecht, 9 Ohio Dec. (Reprint) 66, 10 Wkly. L. Bul. 342.

192. Dunsbach v. Hollister, 49 Hun (N. Y.), 352, 353, 17 N. Y. St. R. 461, 2 N. Y. Supp. 94, case aff'd 132 N. Y. 602, 44 N. Y. St. R. 934.

193. Harris v. Thompson, 9 Barb. (N. Y.), 350.

194. Paddock v. Somes, 102 Mo. 226, 239, 10 L. R. A. 254, 14 S. W. 746.

195. Richards v. City of Waupun, 57 Wis. 45, 17 N. W. 975.

196. 18 & 19 Vict. c. 121. s. 8.

197. St. Helens Chemical Co. v. The Corporation of St. Helens, L. R. 1 Exch. 196.

rense where a private nuisance exists, that the party injured thereby could have, but has not, prevented the damage to his property.[198] Nor is it any defense, nor does it exonerate defendant from liability, because of the fact that plaintiff could have prevented the injury by a reasonable exertion and trifling expense.[199] If one is obliged to commit a trespass in order to remove a private nuisance he is not chargeable with want of reasonable care amounting to such contributory negligence as to preclude a recovery where he fails to remove such nuisance,[200] and within this rule one is not obligated to commit acts of trespass to lessen his damages, for the law only requires the use of ordinary care and effort as against the injurious consequences of another's wrongful act.[201]

§ 46. Same subject continued—Qualifications and exceptions.—The general rule above stated is not applicable in all cases, or at least there are qualifications of and exceptions to it. Thus it may be generally stated that if a nuisance makes the enjoyment of an estate less beneficial, or in any way makes it expensive or inconvenient without fault on the plaintiff's part he is entitled to compensation therefor.[202] So, it is decided that an owner who is liable to be injured in health and property by the overflow of water should exercise all reasonable care to protect himself and avoid damages, or to lessen the injury, if there exists any known or reasonable way to do so.[203] There is also a certain class of decisions under which the want of ordinary care on the part of the plaintiff in avoiding an injury from a nuisance erected by another is a full defense to the action.[204] And it is also held that a party suing for damages from a nuisance must show that he used ordinary and reasonable care and diligence to avoid the injury.[205]

198. T. A. Snider Preserve Co. v. Brown, 22 Ky. Law Rep. 1527, 60 S. W. 849.

199. Paddock v. Somes, 102 Mo. 226, 238, 14 S. W. 746, 10 L. R. A. 254, citing Wood on Nuis. (2d ed.) 506, (3rd ed.) § 844.

200. Missouri, Kansas & Texas Ry. Co. v. Burt, Tex. Civ. App. 1894, 27 S. W. 948; Gulf, C. & S. F. R. Co. v. Reed, Tex. Civ. App. 1893, 22 S. W. 283.

201. Gulf, C. & S. F. R. Co. v. Reed, Tex. Civ. App. 1893, 22 S. W. 283.

202. Sherman v. Fall River Iron Works Co., 2 Allen (84 Mass.), 524, 526, 79 Am. Dec. 799.

203. Toledo v. Lewis, 9 Ohio Cir. Dec. 451.

204. Crommelin v. Coxe, 30 Ala. 318, 68 Am. Dec. 120.

205. Mayor & City Council of Bal-

So, the court, in a Connecticut case, says: "It is a familiar principle in this class of cases that the plaintiff must show that he exercised ordinary care at the time of the injury or he cannot recover; in other words, if his own negligence essentially contributed to the injury it cannot be said, in a legal sense, that it was caused by the negligence of defendant. Although this is not a case, strictly speaking, of contributory negligence, yet we think the same principle applies."[206] If a plaintiff may by the exercise of ordinary care and caution escape an injury occasioned by a nuisance, and the proximate and immediate cause of the damage can be traced to such want of ordinary care and caution, then he cannot recover, even though the defendant's misconduct was the primary cause of the injury complained of. This rule was applied in a case of a public nuisance existing by reason of an area which opened in the pavement of a public street and into which plaintiff fell and broke her leg.[207] So, where an obstruction is unlawfully placed upon a highway, and one's horse is injured thereby, he cannot maintain an action on the case for the injury where he failed to use ordinary care to avoid the obstruction.[208] Again, whoever, without special authority, materially obstructs a street or highway, or renders its use hazardous by doing anything upon it, above or below the surface, is guilty of a nuisance. No question of negligence can arise, the act being wrongful and there exists no difference whether the fee of the land within the limits of the easement, is in a municipal corporation or in the wrongdoer; and if an individual sustains special damages therefrom, without any want of due care to avoid injury, he has a remedy by action against the author or person continuing the nuisance.[209] In a Pennsylvania case the defendant constructed certain buildings on a lot of which he was the owner and which was subject to the easement of a mill-race over which he had no control, nor was he obligated to repair the same. It did not appear that it was unusual, negligent, or improper to build as he did. The plaintiff, who bought his lot from defendant, erected thereon

timore v. Marriott, 9 Md. 160, 66 Am. Dec. 326.

206. Parker v. Union Woolen Co., 42 Conn. 399, 402, per Carpenter, J. (a case of a horse being frightened by a steam whistle).

207. Irwin v. Sprigg, 6 Gill (Md.), 200, 205, 46 Am. Dec. 667.

208. Smith v. Smith, 2 Pick. (19 Mass.) 621, 13 Am. Dec. 464.

209. Congreve v. Smith, 18 N. Y. 79, 82.

a house without using precautions which would have afforded protection from the water from the mill-race which it was alleged injured his property, and it appeared from the evidence that his act in so building was one of inexcusable negligence. Relief was sought by a bill in equity which was dismissed. The court said: "At law the plaintiff would have to make out a case of negligence on the part of defendant, and clear of it on his own part. The rule in equity is certainly no harder on defendant . . . We have examined the whole evidence, and are of opinion that in any aspect, whether of negligence of defendant, or contributory negligence of complainant, the complainant has not only failed to make out a clear case in his favor, but has left the weight of evidence on the side of defendants."[210]

§ 47. **Contributory negligence—Maintenance of another nuisance—Other or additional damage of same character by one's own acts.**—The doctrine of contributory negligence, on the ground that plaintiff had maintained a nuisance resulting in similar damages, does not apply where the injury complained of is a nuisance by defendant, as the act of plaintiff in maintaining another nuisance would not contribute to the injury caused by defendant's nuisance. He would cause a separate and additional injury resulting from wholly different acts from those done by defendant He would not contribute to the injury done by defendant, but would commit another injury; although, if plaintiff maintains another nuisance, this should be considered in determining the extent of defendant's liability.[211] One who decisively contributes to bring a mischief on himself, may not impute it to another, but he who does hurt to his neighbor cannot escape liability for the damage thereby occasioned by showing that the person he has injured has also sustained other or additional damage of the same character through separate acts or omissions of his own. In such cases each party is chargeable with the consequences of his own conduct, and neither of them is at liberty to shift his burden to the shoulders of the other. The doctrine of contributory negligence has no application.[212]

210. Mowday v. Moore, 133 Pa. St. 508, 25 Wkly. N. C. 529, 19 Atl. 626.

211. Randolph v. Town of Bloomfield, 77 Iowa, 50, 55, 14 Am. St. Rep. 268, 41 N. W. 562.

212. Philadelphia & Reading R. Co. v. Smith, 12 U. S. C. C. A. 384,

§ 48. **Neglect to abate nuisance—Omission of duty.**—The neglect of the owner or occupier of land to abate a public nuisance, arising thereupon after he becomes aware that a nuisance exists, renders him liable to indictment.[213]

§ 49. **Effect of locating near existing nuisance.**—The fact that a person locates near, or purchases or improves property in the vicinity of, an existing nuisance does not deprive him of his remedy for the maintenance of such nuisance. The fact that he has come to it is immaterial,[214] where no prescriptive right to maintain the same has been acquired.[215] So, where a person sustained special injury by the maintenance of a beer garden, a disorderly place, it was decided that he was not estopped to bring a suit to enjoin the owner from maintaining the same by the fact that the garden had been established several years before the plaintiff purchased the land and built his house thereon,[216] and the fact that a railroad was built several years before plaintiff erected his building near the same was held to deprive him of his right to enjoin the maintenance of a nuisance caused thereby.[217] Again, the fact that a nuisance was in existence when a person purchased his property from a third party raises no presumption that he purchased the property subject to the easement of the defendant to maintain such nuisance.[218]

64 Fed. 679, 680, 27 L. R. A. 131, per Dallas, C. J.

213. So held in Attorney Gail v Tod Heatley [1897], 1 Ch. 560, 66 L. J. Ch. N. S. 275, 76 L. T. Rep. N. S. 174, case reverses 75 L. T. Rep. 452.

214. Kissel v. Lewis, 156 Ind. 233, 59 N. E. 478; Susquehanna Fert. Co. v. Malone, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737, 25 Am. St. R. 595; King v. Morris & E. R. Co., 18 N. J. Eq. 397; Alexander v. Kerr, 2 Rawle (Pa.), 83, 19 Am. Dec. 616; Lohmiller v. Indian Ford Water P. Co., 51 Wis. 683, 8 N. W. 601; Elliotson v. Feetham, 2 Bing. N. C. 134. Compare Eason v. Perkins, 17 N. C. 38.

215. Baltimore v. Fairfield Imp. Co., 87 Md. 352, 39 Atl. 1081, 40 L. R. A. 494, 67 Am. St. R. 344; Mulligan v. Elias, 12 Abb. Prac. N. S. (N. Y.) 259.

216. Kissel v. Lewis, 156 Ind. 233, 59 N. E. 478.

217. King v. Morris & E. R. Co., 18 N. J. Eq. 397.

218. Lohmiller v. Indian Ford Water P. Co., 51 Wis. 683, 8 N. W. 601.

CHAPTER IV.

Prescriptive Right.

Section 50. No prescriptive right as to public nuisances.
51. Same subject—Reasons underlying rule.
52. Nuisance in highway.
53. Pollution of streams.
54. Trade or occupation not a nuisance originally.—Effect of Development of Locality.
55. Prescriptive right to maintain private nuisance.
56. Essential elements of right by prescription.
58. Delay as evidence of acquiescence.
57. Same subject.—Application of rule.

§ 50. **No prescriptive rights to public nuisance.**— No period of use and occupancy, however extended and uninterrupted, or under whatever claim of right, will protect a public nuisance from abatement by the public authorities, or defeat the preventive remedy by injunction to restrain its perpetuation. No prescriptive right to maintain such a nuisance can be acquired.[1] So, it has been de-

1. Woodworth v. North Bloomfield Gravel & Min. Co., 18 Fed. 753; Weiss v. Taylor (Ala., 1905), 39 So. 19; City of Birmingham v. Land, 137 Ala. 538, 34 So. 613; Olive v. State, 86 Ala. 88, 5 So. 653, 4 L. R. A. 33; Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731; Town of Cloverdale v. Smith, 128 Cal. 230, 60 Pac. 851; People v. Gold Run Ditch & M. Co., 66 Cal. 138, 4 Pac. 1152; Phinizy v. Augusta, 47 Ga. 260, 266; Litchfield Whitenack, 78 Ill. App. 364; Bloomington v. Costello, 65 Ill. App. 407; Pettis v. Johnson, 56 Ind. 139; Charlotte v. Pembroke Iron Works, 82 Me. 391, 19 Atl. 902, 8 L. R. A. 828; Woodyear v. Schaefer, 57 Md. 1, 40 Am. Rep. 419; Philadelphia, W. & B. R. Co. v. State, 20 Md. 157; New Salem v. Eagle Mill Co., 138 Mass. 8; Ronayne v. Loranger, 66 Mich. 373, 33 N. W. 840; State v. Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513; State ex rel. Board of Health v. Lederer, 52 N. J. Eq. 675, 29 Atl. 444; City of Rochester v. Erickson, 46 Barb. (N. Y.) 92; Dygert v. Schenck, 23 Wend. (N. Y.) 446, 35 Am. Dec. 575; Mills v. Hall, 9 Wend. (N. Y.) 315, 24 Am. Dec. 160; People v. Cunningham, 1 Denio (N. Y.), 536, 43 Am. Dec. 709; State v. Holman, 104 N. C. 861, 10 S. E. 758; Blizzard v. Danville, 175 Pa. 479, 34 Atl. 846, 38 W. N. C. 225; Comonwealth v. Moorehead, 118 Pa. St. 344, 12 Atl. 824, 4 Am. St.

clared that: "The public health, the welfare and safety of the community, are matters of paramount importance, to which all the pursuits, occupations and employments of individuals, inconsistent with their preservation, must yield. It is, therefore, immaterial, so far as the government is concerned in the administration of the law for the general welfare, how long a noxious practice may have prevailed, or illegal acts been persisted in. Easements may be created in lands, and the rights of individuals may be wholly changed by adverse use and enjoyment, if it is sufficiently protracted; but lapse of time does not equally affect the rights of the State."[2] So, the existence of a nuisance for such a length of time as would create a right by prescription against an individual is no defense to an indictment therefor.[3] And though by the continuance of a nuisance in the shape of a mill-dam a prescriptive right may have been acquired to overflow the lands flooded thereby, it is no defense to a proceeding by the public to abate such nuisance.[4] And a nuisance being unlawful in its inception to the public can never become lawful as to individual members of the public.[5] So, where the use of a stream constitutes a public nuisance, no right by prescription to continue such use can be acquired as against an individual who has sustained a special injury as a result of such use.[6]

R. 599; Barter v. Commonwealth, 2 P. & W. (Pa.) 253; City of New Castle v. Raney, 6 Pa. C. Ct. R. (Pa.) 87; State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737; North Point Consol. I. Co. v. Utah & S. L. C. Co., 16 Utah, 246, 52 Pac. 168, 40 L. R. A. 851, 67 Am. St. R. 607; Meiners v. Miller Brewing Co., 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586; Childs v. Nelson, 69 Wis. 125, 33 N. W. 587; Weld v. Hornby, 7 East, 196.

"An adverse use, which is known to have originated without right within the memory of persons now living, will not alone of itself legitimate a public nuisance, or bar the public of their rights." State v. Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513, per the court.

"*Nullum tempus occurrit reipublicae* applies with unmitigated force against a public nuisance." Dygert v. Schenck, 23 Wend. (N. Y.) 446, 449, 35 Am. Dec. 575, per Cowen, J.

2. Commonwealth v. Upton, 6 Gray (Mass.), 473, 476, per Merrick, J.

3. People v. Cunningham, 1 Denio (N. Y.), 524, 43 Am. Dec. 709.

4. Mills v. Hall, 9 Wend. (N. Y.) 315, 24 Am. Dec. 709. See, also, State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737.

5. Woodruff v. North Bloomfield Gravel & M. Co., 18 Fed. 753.

6. Bowen v. Wendt, 103 Cal. 236, 37 Pac. 149.

§ 51. **Same subject—Reasons underlying rule.**—This rule derives its origin from the common law which did not recognize the acquirement of any right by prescription against the king. "The rule of the common law was expressed by the maxim, *nullum tempus occurit regi*. There was no statute of limitations against the sovereign power, and prescription did not run against the king. This rule has been gradually recognized by the American States, and it has been held that statutes of limitation are not applicable to suits brought by a State, unless they are made applicable to them in terms."[7] It is also said to be founded upon the element of criminality which enters into the offense of creating and maintaining a public nuisance and which should therefore prevent the acquisition by prescription of any right in respect to the maintenance thereof.[8] Again, a reason as to prescription not legalizing a public nuisance is that the community at large will not assert their rights with the same promptness with which individuals will assert theirs.[9] In this case it was said by the court: "The State is impersonal, 'the people do not, and cannot, legally act in a body.' Their power must of necessity be exercised only through agents. It cannot be expected that these agents will manifest the same vigilance in detecting and resisting encroachments on public interests, that individuals evince in the protection of their private rights. Moreover, the State officials are generally few in number and fully occupied with the regular routine of official duties. They do not generally institute proceedings to punish violation of laws except at the instigation of individuals. It may be doubted whether these officers are ever aware of a very large proportion of the infringement on the rights of the State. It has been thought by some that the maxim *nullum tempus occurrit regi*, is an outgrowth of monarchial despotism, and, therefore, inapplicable under our republican form of government. But whatever may have been its origin, this maxim has now for a long time been maintained as a part of the common law, not for the personal convenience of the sovereign, but 'for the security and benefit of the people.'"

7. Attorney-General v. Revere Copper Co., 152 Mass. 444, 449, 25 N. E. 605, 9 L. R. A. 510, per Knowlton, J.

8. Attorney-General v. Revere Copper Co., 152 Mass. 444, 25 N. E. 605, 9 L. R. A. 510.

9. State v. Franklin Falls Co., 49 N. H. 240, 6 Am. Rep. 513.

§ 52. **Nuisance in highway.**—A street or highway is dedicated to the use of the public for the purpose of travel, that is of passage and repassage, and is not subject to any use which is inconsistent with the rights of the public therein. Therefore, no right by prescription can be acquired to maintain a nuisance in a street or highway.[10] So, where by the collection of drivers and vehicles in a street to receive the grains remaining after distillation, called slops, which the proprietors of a distillery were in the habit of delivering to those who came for them, by passing them through pipes to a public street where they were received into casks standing in wagons and carts, the proprietors were guilty of a nuisance by obstructing and rendering the street inconvenient to those passing thereon, it was decided that it was immaterial how long the practice had prevailed or when the distillery was built.[11] And no right can be acquired by prescription to maintain a ditch across a city street in such a manner as to render the same unsafe for the purpose of travel.[12] And where a dam constitutes a nuisance from the fact that it causes a public highway to be overflowed, it is no defense to an indictment therefor that it has been maintained continuously for a period of twenty years.[13] But it has been decided that authority to construct a vault under a sidewalk may be presumed from the fact that a city has knowledge of its construction and makes no objection thereto and that acquiescence therein for many years will be regarded as authorization of the right of a party to maintain the same in a careful and prudent manner.[14]

§ 53. **Pollution of streams.**—No right by prescription can be acquired to drain into a stream where the water is thereby pol-

10. Reed v. Birmingham, 92 Ala. 339, 9 So. 161; Isham v. Broderick, 89 Minn. 397, 95 N. W. 224; Simis v. Brookfield, 13 Misc. R. (N. Y.) 569, 34 N. Y. Supp. 695, 68 N. Y. St. R. 738; Philadelphia v. Friday, 6 Phila. (Pa.) 275; Yates v. Warrenton, 84 Va. 337, 4 S. E. 818, 10 Am. St. R. 860; Chase v. City of Oshkosh, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553, 29 Am. St. R. 898 (as to nuisance in highways see §§ 212-264 herein).

11. People v. Cunningham, 1 Denio (N. Y.), 524, 43 Am. Dec. 709.

12. Lewiston v. Booth, 3 Idaho, 692, 34 Pac. 809.

13. State v. Phipps, 4 Ind. 515.

14. Gridley v. City of Bloomington, 68 Ill. 47.

luted or poisoned and is in its nature and consequences an injury to all who come within the sphere of its operation and affects the public at large, thereby constituting a public nuisance.[15] So, the use of a stream as a sewerway amounts to a public nuisance for which there can be no prescription,[16] as where it is used by a city for drinking purposes.[17]

§ 54. **Trade or occupation not a nuisance originally—Effect of development of locality.**—The fact that a trade or occupation was established at a place remote from buildings and public roads and has been carried on for a period ordinarily sufficient to confer a right or title by prescription, does not entitle the owner to continue it in the same place, after houses have been built and roads laid out in the neighborhood, where it is a nuisance to the occupants of such houses and travelers upon the roads.[18] So, where a person is indicted for a public nuisance by the maintenance of a slaughter house, it is no defense thereto that it was originally built remote from habitations and public roads and that those who are injured by it subsequently erected their buildings within the reach of injurious consequences of which they complain.[19] It was said by the court in this case: "While an offensive or unwholesome trade or business is carried on at a point so remote from others as in no manner to affect or disturb them, the pursuit is lawful; but it necessarily becomes unlawful whenever the adjacent owners so far devote their own property to the purposes of business or resi-

15. City of Birmingham v. Land, 137 Ala. 538; Platt v. City of Waterbury, 72 Conn. 531, 45 Atl. 154; Woodyear v. Schaefer, 57 Md. 1, 40 Am. Rep. 419; Brookline v. Mackintosh, 133 Mass. 215; Kelley v. New York, 89 Hun (N. Y.), 246; Kelley v. New York, 6 Misc. R. (N. Y.) 516, 27 N. Y. Supp. 164, 56 N. Y. St. R. 845; Commonwealth v. Yost, 11 Pa. Super. Ct. 323. See, generally, as to pollution of waters, Chap. , *post*.

16. Woodyear v. Schaefer, 57 Md. 1, 40 Am. Rep. 419.

17. Kelley v. New York, 89 Hun (N. Y.), 246.

18. Commonwealth v. Upton, 6 Gray (Mass.), 473; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; State ex rel. Board of Health v. Lederer, 52 N. J. Eq. 675, 29 Atl. 444; Brady v. Weeks, 3 Barb. (N. Y.) 157; Elliotson v. Feetham, 2 Bing. N. C. 134.

See § 97 herein as to "Change in character of locality—coming into nuisance."

19. Taylor v. People, 6 Parker's Cr. R. (N. Y.) 347.

dence as to render its continuance incompatible with such purposes. This necessarily results from the legal principle which secures to all the right of devoting their property to the ordinary uses to which property is appropriated. Hence, when one person makes such a use of his property as will preclude others who are near him from deriving any substantial benefit or enjoyment from that which they possess, the law wisely intervenes and prevents it for the promotion of the general good."[20]

§ 55. **Prescriptive right to maintain private nuisance.**—The rule applicable as to the acquirement of a prescriptive right in the case of public nuisances does not apply where the nuisance is not a public one but private only. While in the former case no prescriptive right can be acquired, yet where the nuisance is one which affects an individual merely and is not a public one, a right may in many cases be acquired by prescription to maintain the same.[21] In order to acquire this right the existence of certain elements is essential,[22] and one who claims, in an action by another to abate a nuisance, that he has acquired a right by prescription to maintain the nuisance complained of has the burden of showing the existence of all facts necessary to constitute such right.[23] So, it has been declared that: "A title by prescription is a mere presumption made by the law upon a given state of facts in furtherance of public policy or to accomplish the ends of justice. The title by prescription does not depend upon the actual belief of the fact presumed for its support. Hence he who invokes the aid of the court to sustain such a title, must show a concurrence in his favor of all the facts necessary to constitute the title by prescription or authorize the court to presume the fact which it was incumbent upon him to establish. One of the essential ingredients of a valid prescription is, that it must have a continued and peace-

20. Per Daniels, J.

21. Drew v. Hicks (Cal., 1894), 35 Pac. 563; Dana v. Valentine, 5 Metc. (Mass.) 8; Rochester v. Erickson, 46 Barb. (N. Y.) 92; North Point Consol. Irrig. Co. v. Utah & S. L. C. Co., 16 Utah, 246, 52 Pac. 168, 40 L. R. A. 851; Flight v. Thomas, 10 Ad. & El. 590. See cases cited in following sections.

22. See § 56 following herein.

23. Stamm v. City of Albuquerque, 10 N. M. 491, 62 Pac. 973.

able usage and enjoyment and this is wanting if there is a neglect to claim or enjoy it.[24]

§ 56. **Essential elements of right by prescription.**—No prescription begins to run until a right of action accrues and no right of action accrues until injury is inflicted.[25] And no grant, license or authority to maintain a nuisance can be presumed from lapse of time where there have been repeated intermediate expressions of the legislative will prohibiting the same.[26] Where the claim by prescription applies it must be a continued and uninterrupted possession or use for the period required by law as well as adverse to the rights of others.[27] An injury complained of in order to be barred by prescriptive right, must have been continued in substantially the same way and with equally injurious results for the entire period.[28] But where property has been used in the manner complained of and occupied by the defendant and those under whom he claims, to the same extent, under a claim of right against all the world, individuals and the public, for the required period, such use can only be enjoined where it clearly appears that it is a public nuisance.[29]

§ 57. **Same subject—Application of rule.**—The fact that the statutory period has elapsed since the erection of the works causing the smoke and soot complained of as a nuisance, does not bar an action for the damages caused by such nuisance where the ac-

24. Rhodes v. Whitehead, 27 Tex. 304, 312, per Moore, J.

25. Norton v. Valentine, 14 Vt. 239, 39 Am. Dec. 220. See Stamm v. City of Albuquerque, 10 N. M. 491, 62 Pac. 973.

26. Lewis v. Stein, 16 Ala. 214, 50 Am. Dec. 177.

27. Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567, affg. 2 Thomp., &c., 231, holding that there was no prescriptive right to maintain a brick yard where its use as such had been abandoned during a part of the required twenty years. North Point Consol. I. Co. v. Utah & S. L. C. Co., 16 Utah, 246, 52 Pac. 168, 40 L. R. A. 851.

28. Crosby v. Bessey, 49 Me. 539, 77 Am. Dec. 271; Matthews v. Stillwater Gas & E. L. Co., 63 Minn. 493, 65 N. W. 947; Ducktown Sulphur Copper & I. Co. v. Barnes (Tenn., 1900), 66 S. W. 593; Goldsmid v. Commissioners, L. R. 1 Eq. 161.

29. Rochester v. Erickson, 46 Barb. (N. Y.) 92.

tionable injury only arose within such period.[30] Thus where defendant had maintained and operated a foundry and cupulo for more than twenty years prior to the time when any complaint had been made, it was decided in a recent case that this fact conferred no right by prescription to continue the operation of the cupulo thereafter in such a manner as to greatly interfere with the plaintiff's occupancy and enjoyment of his property, as in such a case a cause of action does not accrue until damage results and it did not appear that the plaintiff had sustained equal injury during the entire period.[31] So, there was held to be no prescriptive right to deposit bark from a tannery in a stream so as to cause a deposit thereof on plaintiff's land, it appearing that though the depositing of such bark in the stream had been carried on for more than twenty years, yet that it had only been about six years that such deposits had been made on the land of the plaintiff.[32] And the fact that an adjoining owner did not object to the construction of a gas plant has been held not to estop him from objecting to a nuisance caused by the escape of noxious gases therefrom where he made such objection immediately upon the commencement of such nuisance.[33] So, the statute of limitations was held not to begin to run from the time of the erection of a smelter, but only from the time when the fumes complained of commenced to cause the damage.[34] So, where brick burning was shown to have been commenced forty-two years prior to the bringing of the bill, but there was shown to have been an interruption for twenty years, it was held that there having been a cesser of the right for this period, that the nuisance might be complained of by bill.[35] And where a dam had been maintained for sufficient period to give a right by prescription, but within such period it had been raised to a greater height, it was decided that to establish the prescription it must appear that the easement had been enjoyed for the requisite period

30. Churchill v. Burlington Water Co., 94 Iowa, 89, 62 N. W. 646.

31. Over v. Dehne (Ind. App., 1905), 75 N. E. 664.

32. Crosby v. Bessey, 49 Me. 539, 77 Am. Dec. 271.

33. Matthews v. Stillwater Gas & E. L. Co., 63 Minn. 493, 65 N. W. 947.

34. Stenett v. Northport Min. & Sm. Co., 30 Wash. St. 164, 70 Pac. 266.

35. Roberts v. Clarke, 18 Law T. (U. S.) 49. As to brick burning a nuisances see §§ 111, 145, herein.

to the extent claimed at the trial.[36] Again, the fact that noise and vibration from machinery has never been complained of for more than twenty years, does not deprive a neighbor of his right to an injunction restraining any increased noise though such increase be slight.[37] And where noise from a business carried on on adjoining premises had not been complained of for more than twenty years, it was decided that no easement to continue the noise, after plaintiff had so altered his premises as to render such noise a nuisance, had been acquired.[38] And where in the case of an alleged nuisance by a railroad by the maintenance of a culvert, the acts complained of from which the nuisance resulted, were not a complete and permanent injury at the time the railway and culvert were erected, but became so by reason of the occurrence of future events, it was decided that the nuisance being a constantly increasing one, the remedy of the party injured was not lost by prescription.[39] So, where in an ancient mill a new and different machine is erected, of another description, the operation of which constitutes a nuisance to the mills below, such machine is not protected by the antiquity of the mill.[40] And a municipal corporation can acquire no prescriptive right to permit a stream, adopted by it as a sewer, to become so obstructed as a result of such use as to throw filth upon adjoining lands, the right of action arising not out of the adoption of the stream for such purpose, but from the negligence of the municipality in not keeping it in as good a condition as it found it. In such case it owes the duty to keep the channel open and not to permit accumulations and overflow.[41] And where an action was brought for a nuisance by causing offensive smells to arise near to in about plaintiff's house and the plea was the en-

36. Postlethwaite v. Paine, 8 Ind. 105.

37. Heather v. Pardou, 37 L. T. N. S. 393. As to noise a nuisance see §§ 174-191, herein.

38. Sturges v. Bridgman, L. R. 11 Ch. Div. 852. In this case it appeared that plaintiff was a physician and that the premises of defendant abutted on the garden of plaintiff. but the noise had never been felt as a nuisance or complained of by plaintiff until after he had erected a consulting room at the end of his garden, when the noise became a nuisance to him.

39. International & G. N. R. Co. v. Davis (Tex. Civ. App.), 29 S. W. 483.

40. Simpson v. Seavey, 8 Me. 138, 22 Am. Dec. 228.

41. Blizzard v. Danville, 175 Pa. St. 479, 34 Atl. 846.

joyment as of right for twenty years of a mixen on defendant's land whereby during all that time offensive smells necessarily and unavoidably arose from the said mixen, it was decided that there was no right to an easement, unless it appeared that the offensive smells had been used for twenty years, to go over plaintiff's land.[42] So, a man carrying on a noxious business in a place where it has been long established is indictable for a nuisance, if the mischief is increased by the manner or extent in which he carries it on but not otherwise, although the business has increased in amount.[43] And it has been decided that a party does not lose his right by prescription to carry on offensive trade by a mere suspension thereof two years before the twenty elapse, it not appearing that there was an intention to abandon and not resume such trade.[44]

§ 58. **Delay as evidence of acquiescence.**—Mere delay so long as the parties remain in *statu quo* will not deprive a party of equitable relief in the case of a nuisance unless the lapse of time is so great as to create a right by prescription.[45] The extent to which delay is evidence of acquiescence as showing a right by prescription depends upon the circumstances and condition of things in view of which the delay occurs. In this connection it is declared in a federal case that "acquiescence applicable to prescription is conduct recognizing the existence of a transaction, in some extent at least, to carry the transaction, or permit it to be carried into effect. Acquiescence must necessarily exist while the transaction is going on from which a right of action would otherwise arise, and its operation necessarily is to prevent a right of action from this arising, and not to defeat the right after it has arisen. Mere delay, therefore, mere suffering time to elapse, without doing anything, is not acquiescence, although it may be evidence, and sometimes strong evidence, of acquiescence.[46]

42. Flight v. Thomas, 10 Ad. & El. 590. As to smells a nuisance see §§ 157-173, herein.

43. Rex v. Watts, M. & M. 281, 22 E. C. L. 521. As to business a nuisance see §§ 85-129, herein.

44. Dana v. Valentine, 5 Metc. (Mass.) 8.

45. Snow v. Williams, 16 Hun (N. Y.), 468, 473. See Carlisle v. Cooper, 18 N. J. Eq. 241; Gordon v. Cheltenham & Great Western Ry. Co., 5 Beav. 233; Gale v. Abbott, 8 Jur. N. S. 987.

46. Woodruff v. North Bloomfield Gravel Min. Co., 18 Fed. 753, 790, per Sawyer, J.

CHAPTER V.

PURPRESTURES.

SECTION 59. Purprestures.—Generally.
60. Purpresture distinguished from nuisance.
61. Streets, highways, parks, etc.
62. Rights of riparian owners.—Rule at common law.
63. Title to land under navigable waters in State.
64. Rights of riparian owner generally.—Matter for State to determine.
65. Right of riparian owner to build wharf, etc.
66. Abatement and removal of.

§ 59. **Purprestures generally.**—A purpresture may be defined as an encroachment upon or appropriation of lands or waters, or rights or easements therein, which belong to the public.[1] While

1. See, also, following definitions of purpresture:

"A form of public nuisance of which cognizance has been taken by the courts of equity in England and this country is called 'purpresture,' which is defined to be 'an encroachment upon lands, or rights and easements incident thereto, belonging to the public, and to which the public have a right of access or enjoyment, and encroachment on navigable streams.'" United States v. Debs, 64 Fed. 724, 740, per Woods, C. J. (a case of equitable jurisdiction), citing Wood on Nuis. pp. 107, 117; People v. Vanderbilt, 28 N. Y. 396; New Orleans v. U. S., 10 Pet. (U. S.) 662; Att'y-Gen'l v. Forbes, 2 Mylne & C. 123; Kerr on Injunct. p. 395.

A purpresture is an encroachment by a person by which he makes that several to himself which ought to be common to many. Johnson v. United States, 2 Ct. Cl. 391, 401.

A purpresture exists where one incloses or makes several to himself that which ought to be common to many. People v. Park & Ocean R. R. Co., 76 Cal. 156, 161, 18 Pac. 141.

A purpresture signifies a close or enclosure, that is, "when one encroacheth and makes that serviceable to himself which belongs to many." City of Columbus v. Jaques, 30 Ga. 506, 512.

A purpresture is an enclosure or appropriation for private use of that which belongs to the public. Lexington & Ohio R. R. Co. v. Applegate, 8 Dana (Ky.), 289, 299, 33 Am. Dec. 497.

A purpresture is an invasion of the right of property in the soil while the same remains in the people.

the old writers say that it might be committed against either the king, the lord of the fee or any other subject, yet it is now construed as meaning an encroachment against the sovereign either as to public places, highways, or navigable waters.[2] So, an unauthorized encroachment upon the soil of a navigable river is known in law as a purpresture.[3] And rafts continuously moored in a navigable stream which are an unauthorized and illegal encroachment upon a public highway for private purposes, constitute a purpresture.[4]

§ 60. **Purpresture distinguished from nuisance.**—A purpresture is to be distinguished from a nuisance, for though it may be a nuisance, it is not necessarily one,[5] and an obstruction or encroachment may be enjoined or abated as a purpresture though it is not a public nuisance or only slightly inconveniences travel.[6]

Knickerbocker Ice Co. v. Shultz, 116 N. Y. 382, 389, 22 N. E. 564, 26 N. Y. St. R. 852; People v. Vanderbilt, 26 N. Y. 287, 293.

A purpresture means an encroachment upon, and an inclosure of, the property of the crown in a highway, river or harbor. Attorney-General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 370, 381.

A purpresture is an unauthorized encroachment upon, and appropriation of, land or waters which are common and public. Moore v. Jackson, 2 Abb. N. C. (N. Y.) 215.

"Where there is a house erected, or an inclosure made upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, i is properly called a purpresture." 4 Bl. Comm. p. 167.

"Purpresture cometh of the French word '*pourprise*,' which signifieth a close or inclosure,—that is where one encroacheth, or maketh several to himself that which ought to be common to many." Co. Lit. 277b.

2. Sullivan v. Moreno, 19 Fla. 200, 228.

3. People v. Gold Run D. & M. Co., 66 Cal. 138, 146, 4 Pac. 1152, 56 Am. Rep. 80.

4. Moore v. Jackson, 2 Abb. N. C. (N. Y.) 215.

5. People v. Park & Ocean R. R. Co., 76 Cal. 156, 18 Pac. 141; Attorney-General v. Evart Booming Co., 34 Mich. 462.

6. Revell v. The People of State of Illinois, 177 Ill. 468, 482, 52 N. E. 1052, 69 Am. St. R. 257, 43 L. R. A. 790. See § 61 following as to streets, highways, &c.,

The fact that a street will still accommodate public travel, or that the public is only slightly inconvenienced, is immaterial upon the question of the abatement of a purpresture. Smith v. McDonald, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393.

There are, however, some cases in which it is held to be a nuisance *per se*.[7] It is also said to differ from a public nuisance in that the former may ripen into a title because of a grant by the sovereign power of the property in question, while the latter can never be licensed.[8]

§ 61. **Streets, highways, parks, etc.**—In the case of a street or highway a purpresture may consist of an encroachment thereon by building or otherwise or such an enclosure, impediment or obstruction of the same or some part thereof as will amount to an exclusion or hindrance of the citizens and the public at large from the full and beneficial use and enjoyment of the same as a street or highway.[9] So, an obstruction extending into the street five feet and for the length of eighty-five feet and intended to be permanent and the perpetual use of which is necessary for the purpose for which it was designed, is a purpresture.[10] So, a building encroaching on a street or highway is a purpresture,[11] as is also a market house erected in a street,[12] and a wire fence upon a highway.[13] So, streets in their entirety are public properties exclusively for public use, and a municipality cannot authorize the erection of an encroachment upon the street which will amount to a purpresture.[14] And in California it has been decided that the title to Golden Gate Park being vested in the city and county of San Francisco but dedicated to the use of the public and held in trust by the city for such use, whatever materially interferes with and unlawfully abridges this right of the public, it is their right to have abated and

7. Moore v. Jackson, 2 Abb. N. C. (N. Y.) 215; Delaware & Hudson C. Co. v. Lawrence, 2 Hun (N. Y.), 163, aff'd 56 N. Y. 612.

8. Timpson v. Mayor, 5 App. Div. (N. Y.) 424, 430, 39 N. Y. Supp. 248, holding that the power to grant lands under water and permit the construction of bulkheads thereon was vested in the City of New York, it not being claimed that such bulkheads were a nuisance or an obstruction to navigation.

9. Drake v. Hudson River Railroad Co., 7 Barb. (N. Y.) 508, 548, per Jones, P. J. As to nuisances affecting streets or highways, see §§ 212-264, herein.

10. Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393.

11. City of Philadelphia v. Crump, 1 Brewst. (Pa.) 320.

12. City of Columbus v. Jaques, 30 Ga. 506.

13. Borough of Lansdowne v. McEwen, 7 Del. Co. R. 311.

14. People v. Harris, 203 Ill. 272, 67 N. E. 785, 96 Am. St. R. 304.

that the unlawful construction of railroad, a statue, or any building upon the park, is a purpresture.[15] But a railroad so constructed as not to occupy the street in which it is placed or any portion of it exclusively, the entire street being generally open and free for the ordinary purposes, cannot be called a purpresture, and the fact that the street may be subsequently monopolized by the company does not render the railroad such.[16]

§ 62. **Rights of riparian owners—Rule at common law.**—At the common law unmodified by local usage, custom or statute, a riparian owner had no right to build any structures on the submerged lands in front of his own land unless he owned such submerged lands or had a license to do so.[17] The right of property in the soil or bed of a navigable river or arm of the sea, was by common law vested *prima facie* in the sovereign power that is in England in the king, and in this country in the people, but may be alienated by the king or people.[18]

§ 63. **Title to land under navigable waters in State.**—It is the generally accepted doctrine in this country that the State succeeded to the rights of the king and parliament to land under tide[19] and navigable waters.[20] And it is a general rule, except so far as it may be qualified in those cases where the State recognizes ownership or rights to lands under tide waters in the individual, that land under such water belongs to the State,[21] which holds the same in trust for the public.[22] So, in a leading case in New York it was

15. People v. Park & Ocean R. R. Co., 76 Cal. 156, 18 Pac. 141.

16. Lexington & Ohio R. R. Co. v. Applegate, 8 Dana (Ky.), 289, 299, 33 Am. Dec. 497; Milhau v. Sharp, 15 Barb. (N. Y.) 193; Drake v. Hudson River Railroad Co., 7 Barb. (N. Y.) 508.

17. Cobb v. Commissioners of Lincoln Park, 202 Ill. 427, 437, 67 N. E. 5, 95 Am. St. R. 258, 63 L. R. A. 264.

18. People v. Vanderbilt, 26 N. Y. 287, 292, per Selden, J.

19. Martin v. Waddell, 16 Pet. (U. S.) 367; Eisenbach v. Hatfield, 2 Wash. St. 236, 26 Pac. 539, 12 L. R. A. 632.

20. Knickerbocker Ice Co. v. Shultz, 116 N. Y. 382, 387, 22 N. E. 564, 26 N. Y. St. R. 852; Langdon v. Mayor of New York, 93 N. Y. 129.

21. Weber v. Board of Harbor Comm'rs, 18 Wall. (U. S.) 57; Eisenbach v. Hatfield, 2 Wash. St. 236, 26 Pac. 539, 12 L. R. A. 632.

22. Revell v. People of State of Illinois, 177 Ill. 468, 478, 52 N. E. 1052, 69 Am. St. R. 257, 43 L. R. A. 790.

said: "The State has succeeded to all the rights of both crown and parliament in the navigable water and the soil under them.[23] Through the medium of the legislature, the State may exercise all the powers which previous to the Revolution could have been exercised either by the king alone or by him in conjunction with his parliament, subject only to those restrictions which have been imposed by the constitution of this State or of the United States.[24] The right to navigate the public waters and to fish therein belong to the people at large. In that respect every individual has the same right. The riparian proprietor cannot interfere with such use by the public. Should he attempt to appropriate to his own use the lands under water in front of his premises, and to that end should build thereon, it would constitute a purpresture which the State could remove."[25] And again the United States Supreme Court has declared: "It is the settled law of this country that the ownership and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairments of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States."[26] So, a structure built upon the bed of a lake, the title to the bed being in the State in trust for legitimate public uses such as fishing, navigation, and the like, such structure not being in aid of navigation, as for example a building in which to store and repair boats, is a purpresture—an invasion both of the State's title and of the right of the public.[27] So, in a somewhat recent case in Illinois it is decided that the owner of land along the shore of Lake Michigan has no title to land beyond the water's edge, and that while he may

23. Langdon v. Mayor, &c., of New York, 93 N. Y. 129.

24. People v. New York & S. I. Ferry Co., 68 N. Y. 71.

25. Knickerbocker Ice Co. v. Shultz, 116 N. Y. 382, 387, 22 N. E. 564, 26 N. Y. St. R. 852, per Parker, J.

26. Illinois Cent. Railroad v. Illinois, 146 U. S. 387, 435, per Mr. Justice Field, citing Rollard's Lessee v. Hogan, 3 How. (U. S.) 212; Weber v. Harbor Commissioners, 18 Wall. (U. S.) 57.

27. Attorney-General v. Smith, 109 Wis. 532, 85 N. W. 512.

protect his land from invasion by structures thereon, yet he cannot do so by structures which extend beyond such point and that any such structure may be removed or abated.[28]

§ 64. **Rights of riparian owner generally—Matter for State to determine.**—The question as to the rights to lands under tide waters and the waters of a navigable stream is one particularly dependent upon the laws of each State. So, it has been said to be a matter for the State to determine as to rights in lands under tide water and that federal courts generally follow the decisions of the State courts.[29] And where by the laws of a State the title to all land covered by water of a navigable stream and lying in front of any tract of land owned by a citizen of the United States, is vested in such citizen the construction by him of a wharf which does not obstruct navigation will not be a purpresture.[30] And in Michigan a riparian proprietor owns the soil to the middle of the stream and that part of the soil which is covered by water may be used by such owner in any manner he chooses, provided the public use of the stream is not thereby seriously injured, or navigation obstructed, or other riparian owners damaged. And the legislature of this State can not authorize a municipality to make that a purpresture which is not so in fact, if by so doing the constitutional rights of any citizen in his person or property are thereby destroyed or infringed.[31]

§ 65. **Right of riparian owner to build wharf, etc.**—Among the rights possessed by a riparian owner is that of access to the navigable part of the water on the front of which his land lies and it is decided that for that purpose he may make a landing, wharf or pier either for his own use or that of the public, subject to this right of the public that it shall not interfere with navigation and subject also to such general rules and regulations as the legislature may prescribe for the protection of the

28. Revell v. People, 177 Ill. 468, 52 N. E. 1052, 43 L. R. A. 790.

29. Union Depot, Street Ry. & T. Co. v. Brunswick, 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789.

30. Sullivan v. Moreno, 19 Fla. 200.

31. Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661, 28 Am. St. R. 276, 14 L. R. A. 498.

rights of the public.[32] And this right of access is declared to exist without regard to whether riparian ownership extends beyond the dry land.[33] So, it has been decided that a riparian owner may build wharves beyond low water mark provided navigation is not interfered with,[34] and that a purpresture is not a term that applies to a wharf built upon the shore of a navigable stream by the proprietor of the soil, but only so when carried so far into the channel, or so far beyond his title, as to become a nuisance.[35] The authorities, however, are not in harmony upon this point, it being decided in many cases that such a structure constitutes a purpresture.[36] And where the State recognizes a right to construct piers to points of practical navigability having reference to the manner in which commerce on the body of water in question is conducted, it is held to be a necessary incident of such riparian right that the pier shall extend a sufficient distance into the water from the shore so as to reach water which will float any sized vessel engaged in such commerce.[37]

§ 66. **Abatement and removal of.**—A court of chancery has jurisdiction to restrain any purpresture or unauthorized appropriation of the public property to private uses, which may amount to a public nuisance or may injuriously affect or endanger the public interest.[38] This jurisdiction is not, however, limited to those cases where the purpresture constitutes a public nuisance, and it is

32. Illinois Central Railroad v. Illinois, 146 U. S. 387, 446, per Mr. Justice Field. See Yates v. Milwaukee, 10 Wall. (U. S.) 497, 504; Dutton v. Strong, 1 Black (U. S.), 23, 33.

33. Yates v. Milwaukee, 10 Wall. (U. S.) 497, 504.

34. Prior v. Swartz, 62 Conn. 132, 25 Atl. 398, 18 L. R. A. 668, 36 Am. St. R. 333; East Haven v. Hemingway, 7 Conn. 186, 201. See Paine Lumber Co. v. United States, 55 Fed. 854, 866 (Wis. case); People v. Mould, 37 App. Div. (N. Y.) 35, 55 N. Y. Supp. 453, revg. 24 Misc. R. 287, 52 N. Y. Supp. 1032.

35. Harlan & Hollingsworth Co. v. Paschall, 5 Del. Ch. 435; Delaware & Hudson Canal Co. v. Lawrence, 2 Hun (N. Y.), 163, 181, per Potter, J., affd. 56 N. Y. 612.

36. The Idlewild, 64 Fed. 603, 604; Sullivan v. Moreno, 19 Fla. 200, 228; Eisenbach v. Hatfield, 2 Wash. St. 236, 249, 26 Pac. 539, 12 L. R. A. 632.

37. People v. Illinois Cent. R. Co., 91 Fed. 955, 958.

38. Attorney-General v. The Cohoes Co., 6 Paige Ch. (N. Y.) 133, 29 Am. Dec. 755.

decided that a purpresture may be enjoined and abated in a court of equity[39] without regard to whether it is in fact a public nuisance.[41] The words of the court in a recent case are pertinent in this connection. It was here said: "In England there were several adverse rights to be considered in determining whether or not a riparian owner had a right to construct a wharf. We need refer to but two in this discussion. There was the king's *jus privatum* in the soil covered by water, and there was the *jus publicum*, which was the right to have the water kept free from obstructions for the purpose of navigation. An interference with this latter right was a nuisance, and would be abated as such. It is stipulated in the case at bar that the appellant's wharf, if erected, would not obstruct, interfere with, burden or prevent navigation upon Lake Michigan. This question is, therefore, not in the case. An invasion of the king's *jus privatum*, or private property in the soil covered by water, was a purpresture. It is laid down by all the old writers that it might be committed either against the king, the lord of the fee or any other subject. A purpresture is not a nuisance, unless it also interferes with navigation. It may be abated by the crown or the owner of the shore, or restrained by injunction at the suit of the attorney-general, whether it creates a nuisance or not. The remedy for the crown was either by an information of intru-

39. Revell v. People, 177 Ill 468, 52 N. E. 1052, 43 L. R. A. 790.

40. People v. Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351 (holding that a purpresture in a bay or navigable river may be so abated). Hicks v. Smith, 109 Wis. 532, 85 N. W. 512; Attorney-General v. Richards, 2 Anst. 603.

"The appropriation by an individual of a public common may therefore be a purpresture and as it would constitute an invasion of a public right it would be proper that proceedings for its abatement should be taken on behalf of the state." Attorney-General v. Evart Booming Co., 34 Mich. 462, per Cooley, C. J. See City of Philadelphia v. Crump, 1 Brewst. (Pa.) 320 (holding that a bill to restrain a purpresture can be maintained by a municipal corporation or by a private individual without a joinder of the commonwealth.

41. People v. Vanderbilt, 26 N. Y. 287, 293; Hicks v. Smith, 109 Wis. 532, 85 N. W. 512; But see Harlan & Hollingsworth Co. v. Paschall, 5 Del. Ch. 435.

"The decided weight of authority is that a purpresture may be enjoined or abated in a court of equity although it is not injurious or not a public nuisance." Revell v. The People of State of Ill. 177 Ill. 468, 482, 52 N. E. 1052, 69 Am. St. R. 257, 43 L. R. A. 790, per Mr. Justice Craig.

sion at the common law, or by an information at the suit of the attorney-general in equity. In case of a judgment upon an information of intrusion, the erection complained of, whether it was a nuisance or not was abated. But upon a decree in equity, if it appeared to be a mere purpresture without being at the same time a nuisance, the court might direct an inquiry to be made whether it was more beneficial to the crown to abate the purpresture or to suffer the erection to remain and be anented."[42]

42. Cobb v. Commissioners of Lincoln Park, 202 Ill. 427, 433, 67 N. E. 5, 95 Am. St. R. 258, 63 L. R. A. 264, per Mr. Justice Carter.

CHAPTER VI.

Legalized and Statutory Nuisances.

Section 67. Legalized nuisances.—Generally.
68. Acts authorized by legislature.—English rule.
69. Same subject.—American rule.
70. Same subject.—Application of rule.
71. Same subject.—Continued.
72. Rule of construction of such statutes.
73. Legislative authorization.—Nuisance from manner of doing act. —Rules.
74. Same Subject.—Application of rules.
75. Same subject.—Railroads.
76. Where statute permissive.—Locality not designated.
77. Mere recognition by statute of a business or occupation.
78. Acts authorized by municipality.
79. Same subject.—Continued.
80. Same Subject.—Limitations on power of municipality.
81. Statutory nuisances in general.
82. Constitutionality of such acts.
83. Power of legislature to declare nuisances illustrated.
84. Power of legislature to delegate authority to municipality.

§ 67. **Legalized nuisances generally.**—It is a general rule that an act which has been authorized by law cannot be a public nuisance,[1] and that the State cannot prosecute as a nuisance that which it has authorized.[2] So, it has been decided that works of internal improvement which have been erected by the State for the benefit of its citizens do not become a public nuisance from the fact that the neighborhood is thereby rendered unhealthy by the obstruction of running water and consequent overflowing of adjoining lands, and that the character of such works is not changed by the fact that they are transferred to a private corporation which is required to

1. Transportation Co. v. Chicago, 99 U. S. 635; Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252; Masterson v. Short, 3 Abb. Prac. N. S. (N. Y.) 154, 33 How. Prac. 481; Commonwealth v. Reed, 34 Pa. 275, 75 Am. Dec. 61. See subsequent sections in this chapter.

2. Chope v. Detroit & Howell Plank Road Co., 37 Mich. 195, 26 Am. Rep. 512; People v. New York Gas Light Co., 64 Barb. (N. Y.) 55.

maintain the same for the purposes of their creation.[3] So, where the construction of a dam at a specified place in a particular manner and of a certain height has been expressly authorized by the legislature, the one constructing it in accordance with such authorization is not liable to an indictment for a public nuisance created thereby.[4] And where a company has been so authorized to manufacture gas to be used for lighting streets and buildings, it has been decided that if its buildings and processes are of the best, its servants careful and it has used due care and diligence in the business, it is not liable to an indictment for creating a nuisance by unwholesome smells and smoke resulting therefrom.[5] And where a plank road company was authorized by its charter to construct a road from within the city of Detroit and to erect gates at such points as they should select subject to this limitation that none should be erected within the city it was decided that this limitation contemplated the city as it was at the time in respect to the limits and should be so construed, and that the maintenance of a gate could not be substantially enjoined at the suit of the State because of the fact that there had been an extension of the city limits so as to include a gate which the company had erected.[6] So, a telephone pole, the erection of which has been authorized by the State and municipality, is not a nuisance where it does not specially interfere with the use by adjoining owners of their property or invade some vested right.[7] And where a bridge over a navigable river had been declared a nuisance by a decree of court but was made a lawful structure by a subsequent act of Congress, it was decided that an attachment against the proprietors of the bridge for disobeying an injunction against the rebuilding of it after it had been destroyed should not be issued, the injunction having been granted after the passage of the act and before it was determined to be invalid.[8] The general rule, however, does not mean that an act must be unlawful in order to constitute a nuisance as

3. Comonwealth v. Reed, 34 Pa. 275, 75 Am. Dec. 661.

4. Stoughton v. State, 5 Wis. 291.

5. People v. New York Gas Light Co., 64 Barb. (N. Y.) 55.

6. Chope v. Detroit & Howell Plank Road Co., 37 Mich. 195, 26 Am. Rep. 512.

7. Irwin v. Great Southern Telephone Co., 37 La. Ann. 63.

8. State of Pennsylvania v. Wheeling & B. B. Co., 18 How. (U. S.) 421, 15 L. Ed. 435.

acts which are perfectly lawful may work actionable injury to others.[9]

§ 68. **Acts authorized by Legislature—English rule.**—In England the rule prevails that an act, if expressly authorized by parliament, and if done in accordance with the authority conferred, cannot be a nuisance, and though injury may result to another he cannot recover therefor.[10] So, it has been declared in an English case that "when the legislature has sanctioned and authorized the use of a particular thing and it is used for the purpose for which it was authorized, and every precaution has been observed to prevent injury, the sanction of the legislature carries with it this consequence that if damage results from the use of such thing independently of negligence, the party using it is not responsible. It is consistent with policy and justice that it should be so."[11] And an act done under pursuance of a provisional order of the board of trade is protected in England to the same extent as other nuisances done under statutory authority.[12]

§ 69. **Same subject—American rule.**—This rule, however, does not prevail in this country to the same extent. The power of the legislature is here recognized as omnipotent within constitutional limits,[13] while it may legalize an act which might otherwise be a nuisance, it cannot authorize the taking of private property for public use without just compensation.[14] And the rule may be

9. Delaware & Raritan Canal Co. v. Lee, 22 N. J. L. 243. See sections following.

10. Sadler v. City of New York, 40 Misc. R. (N. Y.) 78, 81 N. Y. Supp. 308.

11. Vaughan v. Taff Vale Ry. Co., 5 H. & N. 679, 685, per Cockburn, C. J. See, also, Rex v. Pease, 4 B. & Ad. 30.

12. National Teleph. Co. v. Baker (1893), 2 Ch. 186, 68 L. T. (N. S.) 283, so holding in the case of a current of electricity being discharged into the earth under such authority.

13. People v. New York Gas L. Co., 64 Barb. (N. Y.) 55, 70.

14. Chicago, G. W. R. Co. v. First Methodist Episcopal Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 448; Miller v. Webster City, 94 Iowa, 162, 62 N. W. 648; Sadlier v. City of New York, 40 Misc. R. (N. Y.) 78, 81 N. Y. Supp. 308.

Where a statute authorizes the taking of land by a municipality for the construction of a sewer and the making of compensation therefor, it is held not to refer to lands not actually taken, and the

stated to be that where one has the sanction of the State for what he does unless he commits a fault in the manner of doing it, he is completely justified, provided the legislature has the constitutional power to act.[15] And the legislature may, except so far as it may be limited by constitutional restrictions, when deemed necessary for the public good, permit or require that to be done which would, on common law principles, and without the statute, be deemed a nuisance.[16] And it is a general rule that where an act is made lawful by legislative sanction, annoyances in connection therewith must be borne by the individual subject to this qualification that the act must be done without negligence or unnecessary disturbance, by the one doing it, of the rights of others.[17] So, it has been declared that " when the legislature directs or allows that to be done which would otherwise be a nuisance, it will be valid, upon the ground that the legislature is ordinarily the proper judge of what the public good requires, unless carried to such an extent that it can fairly be said to be an unwholesome and unreasonable law."[18] And where legislative authority is granted for the construction of a work of public utility, upon making compensation, the one constructing it is liable only for such injury as results from the want of due skill and care in exercising the power conferred. So, this principle has been applied where, under such circumstances, one interferes with the current of a running stream.[19]

remedy of one who sustains an injury from noxious odors from works which have been constructed by the city to treat the sewage is held not to be by proceedings under the statute, but by an action at law. Bacon v. Boston, 154 Mass. 100, 28 N. E. 9.

15. Bellinger v. New York Cent. R. R., 23 N. Y. 47. See, also, Currier v. West Side E. P. R. Co., Fed. Cas. No. 3493, 6 Blatchf. C. C. 487; Williams v. New York Cent. R. R. Co., 18 Barb. (N. Y.) 222.

16. Pittsburg, C. & St. L. Ry. Co. v. Brown, 67 Ind. 145, 33 Am. Rep. 73; People v. New York Gas L. Co., 64 Barb. (N. Y.) 55, 70; Taylor v. Baltimore & O. R. Co., 33 W. Va. 39, 10 S. E. 29, 39 Am. & Eng. R. Cas. 259.

17. Sawyer v. Davis, 136 Mass. 239, 49 Am. Dec. 27; Watson v. Fairmont & S. Ry. Co., 49 W. Va. 528, 39 S. E. 193. See New Albany & I. R. Co. v. Hegman, 18 Ind. 77; Daniels v. Keokuk Water Works, 61 Iowa, 549, 16 N. W. 705; Coleman v. City of New York, 70 App. Div. (N. Y.) 218, 75 N. Y. Supp. 342, affd. 66 N. E. 1106.

18. Sawyer v. Davis, 136 Mass. 239, 241, 49 Am. Dec. 27, per Allen, J.

19. Bellinger v. New York Cent. R. R. Co., 23 N. Y. 43. See Couhocton Stone Road Co. v. Buffalo, N.

Mere legislative authority, however, to carry on a certain business or occupation, does not confer any license or authority to continue the same after it has become a nuisance. Legislative authority to create a nuisance cannot be inferred from such an authority, but the business must be conducted within the limits of the law.[20] Again, though a nuisance may be legalized and therefore protected from indictment or against any interference with it as a public nuisance, it is decided that the one maintaining it may, nevertheless, be liable to an individual for damages he may sustain therefrom.[21] This principle has been applied in the case of an elevated railway constructed in a street by authority from the legislature where it was claimed that the residence of the plaintiff was rendered undesirable and reduced in value by reason of the noises, stenches, and obstruction of light and air caused by the construction and operation of the road. The company by reason of inability, was unable to make reparation and it was decided that an injunction should be granted.[22] The court said in this case: "It is claimed that the legislature have legalized this road, and therefore it is not a nuisance. It is admitted it is not a public nuisance as it would be if the legislature had not legalized it. The statutes effectually protect the company, if it complies with the conditions, from an indictment, and against any interference with its work, as a public nuisance on account of the fee in the streets; but not against claims for private damages arising from injuries to adjacent owners. The company may occupy the streets, but it must occupy them at its peril in a way not to directly or immediately injure private rights. . . . No one will question the utility of the elevated railroad as a public improvement of great convenience and accommodation to the city and the public at large, but these accommodations cannot authorize or justify its invasions on the rights of any portion of our citizens. The individual whose property is affected because the road is of great public value, should be indemnified and fully compensated by the public or by the company, which profits by the improvement, for any loss or damage he has or may have sustained."[23]

Y. & E. R. R. Co., 3 Hun (N. Y.), 523.

20. State of Missouri v. Board of Health, 16 Mo. App. 8.

21. Caro v. Metropolitan Elev. Ry. Co., 46 N. Y. Super. Ct. 138, 166.

22. Caro v. Metropolitan Elev. Ry. Co., 46 N. Y. Super. Ct. 138.

23. Per Spier, J.

§ 70. **Same subject—Application of rule.**—A railroad which is a lawful structure, and the use of steam thereon being lawful, neither the use of the road nor of the steam power will, independent of any negligence or unskillfulness in the construction of the road or of any abuse in the manner of the use, constitute a public nuisance,[24] though it is held otherwise where it is constructed under an act which is unconstitutional.[25] So, it has been decided that in respect to the noises, smoke, vapor or other discomforts arising from the ordinary use of a railroad upon a street, the occupant or owner of a lot and dwelling house upon such street is no more entitled to recover damages from the owner of such road than any citizen who resides or may have occasion to pass so near the street as to be subjected to like discomforts.[26] So, where a railroad company is authorized by statute to construct a railroad and condemns its right of way and damages are assessed under the statute, in the absence of any negligence, unskillfulness or mismanagement in the construction of an embankment or the road bed, the injury thereby done to the property of an individual, must be considered as the natural and necessary consequence of what the corporation had acquired the lawful right to do, and such damages must be taken to have been included in the compensation assessed or as *damnum absque injuria*.[27] And the legislature may authorize an obstruction in a highway which would otherwise be a nuisance,[28] or the construction of a bridge over a navigable river,[29] or of a bridge where

24. Miller v. Long Island R. Co., Fed. Cas. No. 9580a; Evans v. Savannah & W. R. Co., 90 Ala. 54, 7 So. 758; Vason v. South Carolina R. Co., 42 Ga. 631; Davenger v. Chicago & G. T. R. Co., 98 Ind. 153; Randle v. Pacific Railroad, 65 Mo. 325; Baxter v. Spuyten Duyvil & P. M. R. Co., 61 Barb. (N. Y.) 428; Morgan v. Norfolk S. R. Co., 98 N. C. 247, 3 S. E. 506; Attorney-General v. Pope, N. B. Eq. Cas. 272.

The unauthorized use of steam as a motive power creates a nuisance. Hussull v. Brooklyn City R. Co., 114 N. Y. 433, 21 N. E. 1002, 23 N. Y. St. R. 856. See North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788, 790.

25. Astor v. New York Arcade Ry. Co., 3 N. Y. St. R. 188.

26. Parrolt v. Cincinnati H. & D. R. Co., 10 Ohio St. 624. But see Caro v. Metropolitan Elev. Ry. Co., 46 N. Y. Super. Ct. 138, 166.

27. Clark's Adm'x v. Hannibal & St. J. R. Co., 36 Mo. 202.

28. Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336; Perry v. New Orleans M. & C. R. Co., 55 Ala. 413; Dubach v. Hannibal & St. J. R. Co., 89 Mo. 483, 1 S. W. 86.

29. Jolly v. Terre Haute Drawbridge Co., 6 McLean (U. S.), 237.

it does not obstruct navigation.[30] And where authority is conferred by statute upon certain public officials to erect public buildings, they will not be restrained in a suit in equity from erecting a jail, which is a public necessity, near the residences of the petitioners on the ground that it constitutes a nuisance and the value of their property will thereby be diminished.[31] So, where a person is authorized by statute to use a certain part of the public road for his purposes and the portion taken does not exceed that allowed by law, the taking being in pursuance of law, cannot be called a public nuisance.[32] And though the construction of street car tracks in a street might so interfere with the rights of the owners of lots which front on the street as to constitute a private nuisance if not authorized by law, yet if done under authority of a statute in a lawful manner, no action will lie where there has been no negligence or misconduct in constructing such tracks or in their use.[33] A street railway must, however, in order to bring it within the protection of this general rule, be laid in the manner authorized.[34]

§ 71. **Same subject—Continued.**—A canal which is constructed under authority from the sovereign power of the State is not, unless improperly constructed or maintained, a public nuisance.[35] And where a railroad company is required by law to provide facilities at its stations for receiving freight and to receive and transport all live stock offered for transportation, it may establish and maintain stockyards near its stations and will not be liable for a nuisance therefor, where it does not appear that the location was not reasonably proper or that the company did not exercise reasonable care and diligence in the

30. State v. Parrolt, 71 N. C. 311, 17 Am. Rep. 5.

31. Bacon v. Walker, 77 Ga. 336.

32. Danville, Hazelton & W. R. R. Co. v. Commonwealth, 73 Pa. 29, 38; Atorney-General v. Pope, N. B. Eq. Cas. 272.

33. People v. Kerr, 27 N. Y. 185, 193.

It is neither a public nor a private nuisance. People v. Law, 34 Barb. (N. Y.) 494, 514.

34. Durbach v. Hannibal & St. J. R. Co., 89 Mo. 483, 1 S. W. 86. See Cain v. Chicago, R. I. & P. R. Co., 54 Iowa, 255, 3 N. W. 736.

35. Paterson v. City of Duluth, 21 Minn. 493. See Butler v. State, 6 Ind. 165.

maintenance of such yards.[36] So, where a statute authorizes the sinking of a shaft for a tunnel, all things reasonably necessary for the accomplishment of the work are included in the power conferred and there is no liability for noise in connection with the pumping where such noise is not unreasonable.[37] And the construction by a city, in accordance with statute, of a sewer as an outlet to its sewage farm has been held in California not to be a nuisance, it being, however, declared that the fact that it may cause loss or injury to others for which they may be entitled to compensation, is another matter.[38] In a case in Canada, however, it was decided that a corporation which was authorized by its charter to do all things necessary for the construction and operation of its works and to carry out the objects of the corporation subject to the laws of the province and the laws and ordinances of the city, but which had no exclusive right to make or supply gas and was not required to furnish gas and which had no right to condemn property but only to acquire it by purchase the same as an individual, was liable for a nuisance the same as a private individual, the authority to construct its works not amounting to a legislative authority.[39] The sale of liquors may likewise be permitted by license from the State, and being thus a legally legitimate business, it is not a nuisance *per se* or a thing or occupation that must necessarily become a nuisance.[40] So, the legislature may authorize the ringing of factory bells at certain hours though the ringing of such

36. Dolan v. Chicago, M. & St. P. R. Co., 118 Wis. 362, 95 N. W. 385.

A railroad company must exercise such care and supervision over stockyards maintained by it as to insure their cleanliness, and in case of a failure to perform this duty and a nuisance arises in consequence thereof which injures adjoining property it will be liable in damages therefor. Where, however, a nuisance is caused by the noise and shouting of those in charge of the stock which is placed in such a yard and the company has no control over such persons and does not encourage them, it is held not liable for the nuisance thus caused. Illinois Central Ry. Co. v. Grabill, 50 Ill. 241. See Anderson v. Chicago, M. & St. P. Ry. Co., 85 Minn. 337, 88 N. W. 1001.

37. Harrison v. Southwark & Vauxhall W. Co. (1891), 2 Ch. 409.

38. Pasadena v. Stimson, 91 Cal. 238, 27 Pac. 604.

39. Francklyn v. People's Heat & L. Co., 32 N. S. 44.

40. De Blanc v. Town of New Iberia, 106 La. 680, 31 So. 311. Examine Pearce v. State, 35 Tex. Crim. R. 150, 32 S. W. 697. As to intoxicating liquors, see § , herein.

bells has been previously enjoined as a nuisance.[41] And it may likewise require railroad companies to sound whistles on their trains when approaching a crossing.[42]

§ 72. **Rule of construction of such statutes.**—In the determination of the question whether a statute authorized the doing of a certain act which would be a nuisance if not so authorized, the rule applies that statutes in derogation of private rights or which may result in imposing burden upon private property, are to be strictly construed. In such cases the statutory sanction necessary to justify such act must be given either expressly or by clear and unquestionable implication from the powers conferred so as to show that the legislature intended and contemplated the doing of the very act in question.[43] Such statutes should receive a strict construction,[44] and it will not be assumed that the legislature intended to authorize a nuisance unless this is the necessary result of the powers granted.[45] So, a statute which confirms the location and construction of a railroad already completed will not be construed as exempting the corporation from liability for unnecessary and unreasonable encroachments or from a nuisance arising from the manner in which it has constructed or is maintaining a part of the road at the time of the enactment.[46] And an act of the legislature which legalizes, for the time being, erections in a munici-

41. Sawyer v. Davis, 136 Mass. 239, 49 Am. Dec. 27. As to bells a nuisance, see § 179, herein.

42. Pittsburg, C. & St. L. R. Co. v. Brown, 67 Ind. 45, 33 Am. Rep. 73. As to whistles a nuisance, see § 180, herein.

43. Pine City v. Munch, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763; Morton v. Mayor of New York, 140 N. Y. 207, 212, 35 N. E. 490, 55 N. Y. St. R. 413, 22 L. R. A. 241; Hill v. Mayor of New York, 139 N. Y. 495, 34 N. E. 1090, 54 N. Y. St. R. 797; Bohan v. Port Jervis Gas L. Co., 122 N. Y. 18, 25 N. E. 246, 33 N. Y. St. R. 246, 9 L. R. A. 711; Cogswell v. New York, N. H. & H. R. R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Pensylvania Railroad Co.'s Appeal, 115 Pa. 514, 5 Atl. 872; Reg v. Bradford Nav. Co., 6 B. & S. 631. See Woodruff v. North Bloomfield Gravel Min. Co., 18 Fed. 753.

44. Mayor of Jersey City v. Central Railroad Co. of N. J., 40 N. J. Eq. 417, 22 Atl. 262; Hughes v. Providence & Worcester R. R. Co., 2 R. I. 493, 505.

45. Bacon v. Boston, 154 Mass. 100, 28 N. E. 9.

46. City of Salem v. Eastern R. Co., 98 Mass. 431, 96 Am. Dec. 650.

pality, which are at the time a nuisance, is to be construed as simply a license to continue the same which may be subsequently revoked by the legislature, nothing having been done or suffered as a consideration for the license which caused it to partake of the nature of a contract.[47]

§ 73. **Legislative authorization—Nuisance from manner of doing act—Rules.**—There is a distinction between parliamentary powers to do acts which necessarily involve the commission of nuisances and powers which may possibly be exercised without giving rise to nuisances.[48] Where the legislature authorizes an act which does not necessarily result in a nuisance but such a result flows from the manner in which the act is done, the legislative license is no defense.[49] So, though a corporation may be authorized by law to do a certain act, it must so use its powers as not to injure another. The fact that a work is a lawful and beneficial one will not relieve the party constructing it from liability to another who is injured by its improper and unskillful construction. The grant of a franchise by the State to a person does not confer upon him the right to inflict damage upon another which by reasonable caution could have been prevented.[50]

§ 74. **Same subject—Application of rules.**—Legislative authority to construct a work does not exempt one from liability for injury from the use of any means which may be necessary for the convenient prosecution of the work such as storing with impunity in a convenient place of so much explosives as may be necessary for the prosecution of the work, without regard to the safety of others.[51] And one who has a contract with the State for enlarging a public canal may not claim that by virtue of his contract he has

47. Councils of Reading v. Commonwealth, 11 Pa. 196, 51 Am. Dec. 534.

48. Attorney-General v. Metropolitan Board of Public Works, 1 Hem. & M. 298.

49. Pine City v. Munch, 42 Minn. 342, 44 N. W. 197, 6 L. R. A. 763; Kobbe v. New Brighton, 23 App. Div. (N. Y.) 243, 48 N. Y. Supp. 990. See Cleveland, C., C. & St. L. R. Co., 67 Ill. App. 351.

50. Taylor v. Baltimore & O. R. Co., 33 W. Va. 39, 46, 10 S. E. 29. See, also, Woodruff v. North Bloomfield Gravel M. Co., 18 Fed. 753.

51. McAndrews v. Collerd, 42 N. J. L. 189, 36 Am. Rep. 508.

such a delegation of sovereign power, as that he can of his own motion confiscate private property to the public use permanently or temporarily.[52] And one who has entered into a contract with a city for the construction of a reservoir, acquires no right, by reason of the fact that the work was authorized by the legislature, to create and maintain a nuisance by the operation of a railway track for the purpose of carrying away the earth from the excavation, especially where it appears that another route equally available could have been selected.[53] So, in the construction of public works such as a sewage system, it is unjustifiable to so construct and conduct the works as for the mere purpose of saving expense, to seriously injure the property rights of individuals.[54] So, a license to conduct a liquor business will afford a person no protection from the civil consequences of acts and practices upon the premises which are unlawful and immoral.[55] And though a person may have a license to conduct a concert hall, yet he may, by the use of such license, create a nuisance as where by such use disorderly crowds collect and conduct themselves in a boisterous manner and lewd women are presented to the public view in indecent attire and their conduct is lascivious.[56] Again, though a person may be authorized by an act of the legislature to erect and maintain a dam in a navigable river, yet if the dam is so built as to obstruct navigation beyond what the act authorized, it is a public nuisance which may be abated *pro tanto*.[57]

§ 75. **Same subject—Railroads.**— A railway company is bound to exercise the power given to it in derogation of individual rights, with moderation and discretion and not negligently, and where in executing works authorized by statute it does not take sufficient and proper precautions to prevent an injury to adjoining property,

52. St. Peter v. Denison, 58 N. Y. 416, 17 Am. Rep. 258.

53. Bohnsack v. McDonald, 26 Misc. R. (N. Y.) 493, 56 N. Y. Supp. 347.

54. Attorney-General v. Metropolitan Board of Works, 1 Hem. & M. 298.

55. Kissel v. Lewis, 156 Ind. 233, 59 N. E. 478; Haggart v. Stehlin, 137 Ind. 43, 35 N. E. 997, 22 L. R. A. 577; Koehl v. Schoenhausen, 47 La. Ann. 1316, 17 So. 809.

56. Koehl v. Schoenhausen, 47 La. Ann. 1316, 17 So. 809.

57. Renwick v. Morris, 7 Hill (N. Y.), 575.

an injunction will be granted to restrain the negligent exercise of its powers.[58] And the right conferred by the legislature to use locomotives does not confer upon a railroad company the right to use locomotives which are so constructed as to throw burning coals along the line of its right of way so as to set fire to adjoining buildings, but such right is only granted upon the condition imposed by law upon the use of all privileges and property, that is, that they shall be so used as to do no unnecessary damage to others.[59] And the fact that the construction and maintenance by a railroad of a turntable is authorized by law, confers no right upon the company to use the table in such a manner as will render the same a nuisance to one who owns adjoining premises.[60] And a railroad company is liable for a nuisance where the running of its trains on the Sabbath is accompanied with such a ringing of bells, blowing off of steam and other noises in the neighborhood of a church during public worship as to so annoy and molest the congregation worshipping there as greatly to depreciate the value of the building and render the same unfit for a place of religious worship.[61] And

58. Biscoe v. Great Eastern Ry. Co., L. R. 16 Eq. Cas. 636. See Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1.

Land acquired in a city for terminal purposes for a railroad company must be used with due regard to the comfort and property rights of others and so as to cause the least annoyance possible. Ridge v. Pennsylvania R. Co., 58 N. J. Eq. 172, 43 Atl. 275.

The maintenance of a stationary engine on land owned by a street railway which so interferes with the enjoyment of adjoining premises as to create a nuisance is not authorized by a license from the municipal authorities to maintain and operate a line of cable cars upon the streets of a city. Tuebner v. California Street Ry. Co., 66 Cal. 171, 4 Pac. 1162.

Annoyance caused by a coal chute used to supply engines with fuel and constructed within the railroad right of way is not the subject of damages to one residing on property ninety-three feet distant from the right of way and not abutting thereon where the chute is properly built and maintained, as a railroad cannot be operated without fuel and proper structures to supply the same are necessary at convenient points. Dunsmore v. Central Iowa Ry. Co., 72 Iowa, 182, 33 N. W. 456.

59. King v. Morris & Essex R. R. Co., 18 N. J. Eq. 397. See Jackson v. Chicago & N. W. R. R. Co., 31 Iowa, 176, 7 Am. R. 120; Bedell v. Long Island R. R. Co., 44 N. Y. 367.

60. Garvey v. Long Island R. Co., 9 App. Div. (N. Y.) 254, 41 N. Y. Supp. 397.

61. First Baptist Church v. Schen-

where a railroad company has been authorized by its charter and the general statute to alter a highway in the construction of its road, but only upon condition that it is restored to its former state or put in as good repair as at the time of altering it, and the company alters the highway but fails to comply with the conditions, it will be liable as for a nuisance.[62] In this connection it has been said: "The entry of a company to build its railroad being lawful, it stands as if it were on its own ground, and the maxim applies, *sic utere tuo ut alienum non laedas*.. It should so perform its act as not to carry over its injurious consequences beyond the hurt it may lawfully inflict."[63]

§ 76. Where statute permissive—Locality not designated.—Where a person is given authority by a permissive statute to carry on a certain trade, business, or occupation or to erect a structure

ectady & Troy R. R. Co., 5 Barb. (N. Y.) 79. In this case it was said by the court: "The evidence is sufficient to show, that by the disturbances of which the plaintiffs complain, the usefulness of their house, for the purposes to which it had been appropriated, is at least impaired. This is not seriously controverted by the defendants, but they insist that they have done no more than by their charter they were authorized to do, and that therefore, if the plaintiffs have sustained damage by their acts, it is *damnum obseque injuria*. If this position is true in point of fact, it is an answer to the action. If the defendants have only pursued the path prescribed for them by the laws from which they derive their existence, they have committed no wrongful act. . . . But I find nothing in the statutes which give the defendants existence and prescribe their corporate powers, which can be construed to justify them in creating the nuisances of which the plaintiffs complain. They are indeed authorized to make their railroad, and to acquire the land necessary for that purpose. They are also authorized to use their road for the transportation of passengers and freight. But in the exercise of this authority they are not to be exempt from liability for injuries to others, to the same extent as if the railroad had been constructed and used by individuals owning the land without legislative sanction. If, either in the construction or use of the road, they commit an act for which an individual, under the same circumstances, would be liable, they too must be held answerable for the consequences. Every corporation takes its powers subject to this implied restriction. Any other doctrine would lead to unimaginable mischiefs." Per Harris, P. J.

62. Hampden v. New Haven & Northampton Co., 27 Conn. 158.

63. Pittsburgh, Fort Wayne & Chic. Ry. v. Gilleland, 56 Pa. St. 445, 450, 94 Am. Dec. 97, per Agnew, J.

and the locality is not designated, the person is not thereby authorized to carry on such trade, business, or occupation, or to erect such structure at any place he may think proper, but must act with proper regard for the rights of others. If he does not and by his act a nuisance is created, the statute will not operate to exempt him from liability.[64] So, where a railroad company is authorized by its charter to acquire property at such places as it shall deem expedient for the purpose of constructing railroad terminal facilities, it thereby acquires no right to construct a round house wherever it may think proper without regard to the rights of others or a license to commit a nuisance in any place it may select,[65] and in a case in the United States Supreme Court it was said: "The authority of a company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road did not authorize it to place them wherever it might think proper in the city without reference to the property and rights of others."[66] And in a case in England it has been decided that where an act is done under a statute, the terms of which are not imperative but permissive, and it is not manifest that there was any intention on the part of the legislature that any of the optional powers should be exercised at the expense of, or so as to interfere with any man's rights, the inference arises that such powers are to be exercised in strict conformity with private rights.[67] So, where a railway company was empowered by its act to carry cattle and

64. Baltimore & Potomac R. R. Co. v. Fifth Baptist Church, 108 U. S. 317; Beseman v. Pennsylvania R. R. Co., 50 N. J. L. 235, 13 Atl. 164; Cogswell v. New York, N. H. & H. R. Co., 103 N. Y. 10, 8 N. E. 537, 57 Am. Rep. 701; Louisville & N. T. Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188; Davie v. Montreal Water & Power Co., Rap. Jud. Queb. 23 Can. S. 141. Compare Georgia R. & Bkg. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315.

65. Louisville & N. T. Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188.

Coal sheds may by reason of their location in a residential locality be a nuisance. Wylie v. Elwood, 134 Ill. 281, 25 N. E. 570, 9 L. R. A. 726, 23 Am. St. R. 673, affirming 34 Ill. App. 244; Spring v. Delaware, Lackawanna & W. R. Co., 88 Hun (N. Y.), 385, 34 N. Y. Suppl. 810.

66. Baltimore & Potomac R. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 331, per Mr. Justice Field.

67. Managers of the Metropolitan Asylum Dist. v. Hill, 6 App. Cas. 193.

to purchase land for additional station yards for cattle and for other purposes it was decided, the company having purchased land and used it for unloading cattle, that, as there was no obligation on the company to carry cattle or to have a station for them, and as it was not shown that the place where the station was located, was the only available place for such a station, the yards constituted a nuisance which the company had no power to create and an injunction should be granted.[68] And where the location of a waterworks plant was not fixed by the charter but was optional with the company, the fact that its charter authorized it "to carry on the business of supplying water and to use steam and electricity for such purpose" did not exempt it from liability to the owners of adjoining property for a nuisance caused by smoke, noise and inhalations resulting from the operation of the plant.[69] And a statute giving to a city discretion as to the selection of lands for the construction of a sewer confers no authority on the city to create an unnecessary nuisance.[70] So, legislative authority to carry on the work of a brick kiln will not be a valid defense to a public prosecution or to a private action for a nuisance created in carrying it on.[71] And the fact that a corporation is organized under legislative authority for the purpose of manufacturing gas does not relieve it from liability for a nuisance caused by the operation of its plant where the location of such plant was not prescribed by the legislature.[72] This question as to how far legislative authority protected a gas company where the erection of the works at the particular place was not specially authorized by statute is considered in an English decision. In this case the company was incorporated under an act of parliament subject to the English Gasworks Clauses Act of 1871, § 9, which provided that "nothing in

68. Truman v. London, Brighton & S. C. Ry. Co., L. R. 25 Ch. Div. 423.

69. Davis v. Montreal Water & Power Co., Rap. Jud. Queb. 23 Can. S. 141. See Foot v. Burlington Water Co., 94 Iowa, 89, 62 N. W. 648. As to smoke a nuisance see §§ 135-156, herein. As to noise a nuisance see §§ 174-191, herein.

70. Bacon v. Boston, 154 Mass. 100, 28 N. E. 9. As to sewers a nuisance, see Chap. XIII, herein.

71. State v. Board of Health, 16 Mo. App. 8. As to brick kilns a nuisance see §§ 111, 145, herein.

72. Bohan v. Port Jervis Gas Light Co., 45 Hun (N. Y.), 257, 10 N. Y. St. R. 374, aff'd 122 N. Y. 18, 33 N. Y. St. R. 246, 25 N. E. 246, 9 L. R. A. 711.

this or the special act shall exonerate the undertakers from any indictment, action or other proceeding for nuisance being caused by them." It appeared that there was an obstruction of light by the erection of the plant and that in excavating for the gas meter the defendant reached down to and cut through a stratum of silt which supported plaintiff's houses with the result that the land under such houses subsided and the subsidence caused damage. It was decided that the particular location not being specially authorized by statute, the defendant was liable for the nuisance caused by its works and could not avoid liability on the grounds of statutory authorization or that it was required by law under penalty to furnish gas within the district within which its meter was located.[73]

§ 77. **Mere recognition by statute of a business or occupation.** —The fact that a statute recognizes the existence of a certain occupation and makes certain regulations in respect to its conduct, does not amount to affirmative action authorizing such occupation and therefore render it lawful where it becomes a public nuisance. Mere failure to prohibit the acts complained of does not amount to affirmative action authorizing them.[74] So, the fact that a statute prescribes the thickness of the walls of a building which is used for certain designated purposes does not justify the use of a building for such purpose at any place where a necessary consequence of such use is the emission of vapors which constitute a nuisance at common law by their unwholesome and offensive nature.[75]

§ 78. **Acts authorized by municipality.**—An act which would otherwise be a nuisance may in many cases be relieved of its character as such where it has been authorized by a municipality in the lawful exercise of its powers. This principle applies in the case of obstructions in the streets where the municipality has been empowered to authorize the same.[76] So, where the city which owns

73. Jordeson v. Sutton (C. A.), 68 L. J. Ch. N. S. 457.

74. Woodruff v. North Bloomfield Gravel Min. Co., 18 Fed. 753, 777. See Wheeling Bridge Case, 13 How. (U. S.) 566.

75. Commonwealth v. Kidder, 107 Mass. 188.

76. Chicago Dock & Canal Co. v. Garrity, 115 Ill. 155, 3 N. E. 448; Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518; Merchants' Union

the fee in the streets is vested with authority by the legislature to control the same, the construction of a railroad track in the streets of a city in such a manner that it neither obstructs or abridges the right of passage and repassage for other purposes is not such an exclusive appropriation of the street as amounts to a nuisance, though it may subject the inhabitants thereof to detriment and annoyance, as having been authorized by competent legal authority it will not be restrained by a court of equity.[77] Where, however, such an authorization is given, the extent of the right is limited by the terms thereof and if a person, in constructing a railway in such a case, exceeds the rights which have been granted, he will be liable therefor to one who sustains special injuries in consequence thereof.[78] And an opening in a sidewalk in a street will be relieved of its character as a nuisance upon proof of municipal consent thereto.[79] And one receiving a license from the municipal authorities to make an excavation under a sidewalk in a city street will not be guilty of maintaining a nuisance, but is only liable for negligence for failure to exercise due care for the safety of the public.[80] So, it has been declared that a municipality may, in the exercise of its power to make any use of a street which reasonably conduces to the public convenience and enjoyment, authorize the erection of a waiting room in a street which is not subject to abatement as a nuisance at the suit of an abutting owner,[81] and like-

Barb Wire Co. v. Chicago, B. & Q. Ry. Co., 70 Iowa, 105, 28 N. W. 494; Hoey v. Gilroy, 129 N. Y. 132, 31 N. Y. St. R. 181, 29 N. E. 85; Clark v. Blackmar, 47 N. Y. 150; Mercer v. Pittsburgh, Fort Wayne & Chic. R. R. Co., 36 Pa. St. 99; Railroad v. Bingham, 87 Tenn. 522, 11 S. W. 705, 4 L. R. A. 622. As to power of municipality to authorize obstructions see §§ 260, 261, herein.

77. Milburn v. City of Cedar Rapids, 12 Iowa, 246; Lexington & Ohio R. R. Co. v. Applegate, 8 Dana (Ky.), 289, 298, 33 Am. Dec. 497; Chapman v. Albany & Schenectady R. R. Co., 10 Barb. (N. Y.) 360; Drake v. Hudson River R. R. Co., 8 Barb. (N. Y.) 509; Hamilton v. New York & Harlem R. R. Co., 9 Paige Ch. (N. Y.) 170. See Haskell v. Denver Tramway Co., 23 Colo. 60, 46 Pac. 121.

78. Cain v. Chicago, R. I. & P. R. R. Co., 54 Iowa, 255, 3 N. W. 736, 6 N. W. 268.

79. Kuechenmeister v. Brown, 13 Misc. R. (N. Y.) 139, 34 N. Y. Supp. 180, 68 N. Y. 230. See, also, Everett v. City of Marquette, 53 Mich. 450, 19 N. W. 140.

80. Babbage v. Powers, 54 Hun (N. Y.), 635, 7 N. Y. Super. Ct. 306, aff'd 130 N. Y. 281, 29 N. E. 132, 14 L. R. A. 398.

81. Cummins v. Summunduwot

wise it is so held as to a structure in a street which is dedicated to the use of the public,[82] or an obstruction on the sidewalk,[83] or a booth for the sale of newspapers erected on the sidewalk under stairs which ascend to an elevated railway.[84]

§ 79. **Same subject—Continued.**— The erection, so authorized, of a pier upon a city street can not be enjoined at the suit of an abutting owner, and to entitle him to the protection of the constitution as to the taking of private property without compensation he must show an injury peculiar to himself and different from that sustained by the rest of the community.[85] So, an awning erected under the authority of, and in compliance with, an ordinance authorizing its erection is not a nuisance.[86] Nor are water tanks erected by a private individual under municipal authority for the purpose of supplying his street sprinklers, they being for a public object.[87] Nor is a market where so authorized,[88] or a building or business where maintained under authority from the city in the lawful exercise of the powers conferred upon it.[89] So, where power is delegated by the constitution of the State to a city to regulate the slaughtering of animals, it is held that it may authorize the erection of slaughter houses and prescribe their location, and that adjoining property owners cannot restrain their erection as being a nuisance.[90] And though a bawdy house is a nuisance *per se*, yet where maintained under a license from the city authorities, it is not to be so regarded though it may become a nuisance by reason

Lodge, 9 Kan. App. 153, 58 Pac. 486.

82. San Antonio v. Strumberg, 70 Tex. 366, 7 S. W. 754.

83. Marini v. Graham, 67 Cal. 130, 7 Pac. 442.

84. People v. Keating, 168 N. Y. 390, 61 N. E. 637, revg. 62 App. Div 348, 71 N. Y. Supp. 97.

85. Gates v. Kansas City, B. & T. R. Co., 111 Mo. 28, 19 S. W. 957.

86. Hoey v. Gilroy, 129 N. Y. 132, 41 N. Y. St. R. 181, 29 N. E. 85. See, also, Hawkins v. Sanders, 45 Mich. 491, 8 N. W. 98.

87. Savage v. Salem, 23 Oreg. 381, 31 Pac. 832, 41 Am. & Eng. Corp. Cas. 169.

88. Miller v. Webster, 94 Iowa, 162, 62 N. W. 648. But see McDonald v. City of Newark, 42 N. J. Eq. 136, 7 Atl. 855.

89. Murtha v. Lovenwell, 166 Mass. 391, 44 N. E. 347, 55 Am. St. R. 410.

90. Darcantel v. People's Slaughter-House & R. Co., 44 La. Ann. 632, 11 So. 239, 37 Am. & Eng. Corp. Cas. 518.

of the manner in which it is conducted.[91] And the deposit of excrement by horses at hitching posts lawfully erected under authority from the municipality in the proper exercise of its powers, being a necessary incident to the lawful use of the posts, is a matter of which a person cannot complain and no injunction against the maintenance of the posts will be granted.[92] So, it was said in this case: "Where a municipal corporation is authorized to do a particular thing, so long as it keeps within the scope of the power granted, it is protected from proceedings on behalf of the public, subject, possibly, to this qualification, that the nuisance, if any, arises as the natural and probable result of the act authorized so that it may fairly be said to be covered in legal contemplation by the legislation conferring the power.[93] It has, however, been determined that though a municipality may have granted permission for the doing of a certain act, it does not thereby lose its authority to subsequently forbid the doing of such act where it becomes a nuisance. Thus it has been so held in the case of permission by a municipality to run a steam engine.[94] It was said by the court in this case: "It is beyond the power of a town council to contract away the authority to prevent or abate nuisances, and if they should do so, their acts are *ultra vires,* null and void and the town is not bound thereby, nor made liable to damages by reason of a breach of such void contract."[95] So, where by the terms of a contract between a county and a city the former was permitted to erect and perpetually maintain, hitching racks upon land surrounding a public square in the city, which racks subsequently became a nuisance as a result of the growth and development of the city and were removed by the city, it was decided that there could be no recovery therefor against the latter.[96]

§ 80. **Same subject—Limitations on power of municipality.**—Although a city may have power to enlarge the general public uses

91. Givens v. Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421.

92. Miller v. Webster City, 94 Iowa, 162, 62 N. W. 648.

93. Miller v. Webster City, 94 Iowa, 162, 62 N. W. 648, per Deemer, J.

94. Wood v. City of Hinton, 47 W. Va. 645, 35 S. E. 824.

95. Wood v. City of Hinton, 47 W. Va. 645, 35 S. E. 824, per Dent, J.

96. Mercer County v. City of Harrisburg, 24 Ky. Law R. 1651, 71 S. W. 928.

of a street it must exercise it so that any use authorized by it will not prove a nuisance to private citizens, impairing the health of the public by producing noxious scents or otherwise rendering the enjoyment of private property impossible.[97] And where a nuisance exists it is no justification therefor that it was authorized by a municipal ordinance where no power is conferred on the municipality to legalize such a nuisance.[98] In those cases where it is claimed that a nuisance is so legalized, the general rule applies that: "The authority which will shelter an actual nuisance must be express or a clear and unquestionable implication from powers conferred, certain and unambiguous, and such as to show that the legislature must have intended and contemplated the doing of the very act in question."[99] So, a municipality cannot authorize obstructions in its streets which would constitute a nuisance in the absence of lawful authority unless such power is conferred upon it either expressly or clearly arises by implication.[100] And a permission in the charter of a municipality to do a certain act, which is not a direction, gives no right to appropriate property without compensation or to create a nuisance. It merely confers a right which must be exercised in conformity with private rights. And the legislature can not authorize the doing of an act by a municipality which would amount to a taking of private property without compensation.[101] So, power conferred upon a municipality to establish a drainage system does not authorize it to establish a system which will constitute a nuisance.[102] And the fact that a munici-

97. Smith v. Atlanta, 75 Ga. 110; Branahan v. Cincinnati Hotel Co., 39 Ohio St. 333, 48 Am. Rep. 457.

98. State v. Luce, 9 Houst. (Del.) 396; Mann v. Willey, 51 App. Div. 169, 64 N. Y. Supp. 589, aff'd in 168 N. Y. 664, 61 N. E. 1131; Morton v. Mayor of New York, 140 N. Y. 207, 212, 35 N. E. 490, 55 N. Y. St. R. 413, 22 L. R. A. 241; Miller v. Burch, 32 Tex. 208, 5 Am. Rep. 242.

99. Morton v. Mayor of New York, 140 N. Y. 207, 212, 35 N. E. 490, 55 N. Y. St. R. 413, 22 L. R. A. 241; Hill v. Mayor of New York, 139 N. Y. 495, 34 N. E. 1090, 54 N. Y. St. R. 797.

100. Grand Rapids E. L. & P. Co. v. Grand Rapids E. E. L. & F. G. Co., 33 Fed. 659; Denver & S. F. Ry. Co. v. Domke, 11 Colo. 247, 17 Pac. 777; Mikesell v. Durkee, 34 Kan. 509, 9 Pac. 278; Glaessner v. Anheuser Busch Brew. Co., 100 Mo. 508, 13 S. W. 707; Attorney-General v. Holtz, 18 N. J. Eq. 410.

101. Sammons v. City of Gloversville, 175 N. Y. 346, 67 N. E. 622, aff'g 74 N. Y. Supp. 1145.

102. Smith v. Atlanta, 75 Ga. 110.

pality is authorized to condemn land for public purposes confers no power upon it, the right of condemnation not having been exercised, to flood the land of a private citizen, for the purpose of its reservoir system and thus create a nuisance.[103] And the right of an abutting owner of access from his property to the street for purposes of business, cannot be unlawfully interfered with by an ordinance authorizing the use of the street as a stand for coaches where, as a result of that use, such access is impossible.[104] So, though the right to construct and maintain a sewage system is conferred upon a city by its charter, the authority must be exercised in conformity with private rights and the system cannot be so constructed as to render it a nuisance.[105] It has, however, been determined that where a municipality is authorized to construct a system of sewers which are to be discharged into a certain river, it cannot be charged with the maintenance of a public nuisance.[106] In this case it was said by the court: "If the power inherent in the legislature to bestow such authority upon the city, it is the settled law of this State that the municipal corporation is not responsible for those incidental damages that result from the proper exercise of its functions, and such exercise will not subject it to charge of maintaining a public nuisance."[107]

§ 81. **Statutory nuisances in general.**—Each citizen holds his property under the implied liability that its use may be so regulated that it shall not be injurious to the equal right of enjoyment by others of their property or to the rights of the community.[108] The legislature may, in the exercise of the general power possessed by it, and within constitutional limits, declare certain acts or places, or the carrying on of a trade or business under particular

103. City of Ennis v. Gilder, 32 Tex. Civ. App. 351, 74 S. W. 585.

104. Branahan v. Cincinnati Hotel Co., 39 Ohio St. 333, 48 Am. Rep. 457. See McCaffrey v. Smith, 41 Hun (N. Y.), 117. Compare Masterson v. Short, 30 N. Y. Super. Ct. 241.

105. Sammons v. City of Gloversville, 175 N. Y. 346, 67 N. E. 622, aff'd 74 N. Y. Supp. 1145.

106. Gray (Simmons v. City of Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717. See Chap. XIII, herein.

107. Per Van Syckel, J.

108. Moses v. United States, 16 App. D. C. 428, 434, 50 L. R. A. 532, per Mr. Justice Shepard.

conditions, or the possession and use of certain property nuisances though they were not such at common law.[109] So, in a case in New York it was said by the court: "The statute declares and defines a new species of public nuisance, not known to the common law, nor declared to be such by any prior statute. But we know of no limitation of legislative power which precludes the legislature from enlarging the category of public nuisances, or from declaring places or property used to the detriment of public interests, or to the injury of the health, morals or welfare of the community, public nuisance, although not such at common law. There are, of course, limitations upon the exercise of this power. The legislature cannot use it as a cover for withdrawing property from the protection of the law, or arbitrarily, where no public right or interest is involved, declare property a nuisance for the purpose of devoting it to destruction. If the court can judicially see that the statute is a mere invasion, or was framed for the purpose of indi-

109. Ripley v. State, 4 Ind. 264; Train v. Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113; City of Pittsburg v. Keech Co., 21 Pa. Super. Ct. 548.

"**It is competent for the legislature to declare** the possession of certain articles of property either absolutely or when held in particular places and under particular circumstances, to be unlawful because they would be injurious, dangerous or noxious, and by due process of law by proceedings *in rem* to provide both for the abatement of the nuisance and the punishment of the offender by the seizure and confiscation of the property by the removal, sale or destruction of the noxious article." Fisher v. McGirr, 1 Gray (Mass.), 1, 61 Am. Dec. 381, per Shaw, J.

"**In the exercise of this power of regulation, called the police power,** there can be no doubt that the legislature has a very wide discretion, and may add to, or substract from, the category of public nuisance recognized at common law,—moving in either direction, as exigencies may suggest, under limitations not yet definitely settled." Moses v. United States, 16 App. D. C. 428, 434, 50 L. R. A. 532, per Mr. Justice Shepard.

A penal statute which prohibits the carrying on of a certain kind of business should not be so construed as to attribute to the legislature a purpose to prohibit the defendant from carrying on his business irrespective of the manner of conducting it or of its effect, injurious or otherwise, upon the community. It will be assumed that it was intended by the legislature, within its police powers, to suppress nuisances and to punish persons carrying on such business in such a way as to become such. People v. Rosenberg, 138 N. Y. 410, 416, 53 N. Y. St. R. 1, 34 N. E. 785, case reverses 67 Hun, 52, 22 N. Y. Supp. 56.

vidual oppression, it will set it aside as unconstitutional but not otherwise."[110] And that which is declared by a valid statute to be a nuisance is to be regarded in law as a nuisance in fact and to be dealt with as such.[111] And it has been decided that where anything is declared by the legislature by a valid act to be a nuisance, it is not competent for a party to show that it is not in fact one.[112]

§ 82. **Constitutionality of such acts.**—Subject to the constitutional rights conferred upon the individual in respect to the use and enjoyment of his property and the limitation upon the legislature that it cannot act arbitrarily where no public right or interest is involved,[113] it may be stated generally that such an act is not unconstitutional merely because it does not provide for compensation.[114] The destruction in the exercise of the police power of the State of property used in violation of law, in maintaining a public nuisance is not a taking of property for public use and does not deprive the owner of it without due process of law.[115] So, a statute which provides that the court shall, where property either from its character or use, is shown to constitute a nuisance, abate the same by the destruction and sale of the property does not violate the rule that property of individuals cannot be forfeited by legislative enactment and that such forfeiture can only be by the judgment of a court of competent jurisdiction in a proper case after due notice.[116] Nor is such a constitutional provision violated by a statute which requires railroad companies to construct and maintain ditches by the sides of the roadbeds sufficient in depth for

110. Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 29 N. Y. St. R. 81, 7 L. R. A. 134, 16 Am. St. R. 813, per Andrews, J. See, also, Mugler v. State of Kansas, 123 U. S. 623, 31 L. Ed. 205; Fisher v. McGirr, 1 Gray (Mass.), 1; In re Jacobs, 98 N. Y. 98.

111. Carleton v. Rugg, 149 Mass. 550, 22 N. E. 55, 5 L. R. A. 193.

112. Train v. Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113. Compare Harrington v. Board of Aldermen, 20 R. I. 233, 38 Atl. 1, 38 L. R. A. 305.

113. Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 29 N. Y. St. R. 81, 7 L. R. A. 134, 16 Am. St. R. 813.

114. Train v. Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113.

115. Mugler v. State of Kansas, 123 U. S. 623, 31 L. Ed. 205; Board of Police Commissioners v. Wagner, 93 Md. 182, 48 Atl. 455, 86 Am. St. R. 423, 52 L. R. A. 775.

116. Craig v. Werthmuller, 78 Iowa, 598, 43 N. W. 606.

drainage of waters which may accumulate as a result of the construction of the road and which provides for the summary abatement of the nuisance on failure to construct such drains after proper notice.[117] And it has been decided that an act declaring the use of a building for either of several purposes to be a nuisance abatable in equity, does not introduce an exceptional mode of trial, or change the ordinary course of procedure on questions properly triable by jury.[118] The legislature cannot, however, declare an act a nuisance where it amounts to a taking of private property without just compensation or due process of law. An act cannot be made a nuisance where by so doing it is a violation of the constitutional rights of the one doing it.[119] "If the thing declared by statute to be a nuisance or the thing regulated or repressed under an exercise of the police power, is not a nuisance in fact, or within the province of the exercise of the police power, then the court will declare the statute unconstitutional, for the power is not to be used under the mere allegation, color or pretence of being a proper exercise of the police power when in truth it is not. But the legislature . . . is to a great extent the proper judge of the necessity for the exercise of this restraining power."[120]

§ 83. Power of Legislature to declare nuisances illustrated.—The legislature may declare that nets set in certain waters are nuisances and may provide for their summary destruction.[121] And a statute declaring bowling alleys nuisances when situated within a certain distance of dwelling houses is constitutional.[122] And an act of Congress declaring that the emission of dense black or gray smoke from any smoke stack or chimney used in connection with any stationary engine in the District of Columbia constitutes a pub-

117. Chicago & E. R. R. Co. v. Keith, 21 Ohio Cir. Ct. R. 669, 12 Ohio C. D. 208.

118. State, Rhodes v. Saunders, 66 N. H. 39, 25 Atl. 588, 18 L. R. A. 646.

119. City of Janesville v. Carpenter, 77 Wis. 288, 8 L. R. A. 808.

120. Harrington v. Board of Aldermen, 20 R. I. 233, 248, 38 Atl. 1, 38 L. R. A. 305, per Rogers, J.

121. Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 29 N. Y. St. R. 581, 16 Am. St. R. 813, 7 L. R. A. 134, aff'd in 152 U. S. 183, 38 L. Ed. 385, 14 Sup. Ct. 499.

122. State v. Noyes, 30 N. H. 279. As to bowling alleys a nuisance see § 109, herein.

lic nuisance has been held not to be a taking of property without due process of law, but a valid exercise by Congress of its police power over the district.[123] And a statute may provide that a dam without a fishway is a nuisance which may be abated as such,[124] or that a building which is used for the illegal sale of intoxicants is a common nuisance and to be regarded and treated as such.[125] So, an ordinance of a city to the effect that all places where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, are common nuisances has been declared not to be in violation of a constitutional provision that all men are possessed of equal and inalienable natural rights among which are life, liberty and the pursuit of happiness.[126] The legislative authority also extends to the power to declare privy vaults in populous districts to be nuisances.[127] And a board of health invested by the legislature with power to make quarantine regulations necessary for the health and safety of the public may require that rags shall be disinfected.[128] But a legislature possesses no power to declare a private residence a nuisance because of the fact that it depreciates the value of adjoining property by obstructing the view or intercepting a breeze which may blow.[129] Again, where the law declares that fences of over a certain height shall be deemed nuisances where they are maliciously erected and maintained for the purpose of annoying the adjoining owners, in order to render fences over the specified height a nuisance, malevolence must be shown.[130]

123. Bradley v. District of Columbia, 20 App. D. C. 169; Moses v. United States, 16 App. D. C. 428, 50 L. R. A. 532. As to smoke a nuisance see §§ 135-155, herein.

124. State v. Meek, 112 Iowa, 338, 84 N. W. 3, 51 L. R. A. 414; State v. Beardsley, 108 Iowa, 396, 79 N. W. 138.

125. Commonwealth v. Howe, 13 Gray (Mass.), 26. See State v. Stanley, 84 Me. 555, 24 Atl. 983.

126. City of Topeka v. Raynor, 61 Kan. 10, 58 Pac. 557.

127. Harrington v. Board of Aldermen, 20 R. I. 233, 38 Atl. 1, 38 L. R. A. 305.

128. Train v. Boston Disinfecting Co., 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113.

129. Quintini v. City of Bay St. Louis, 64 Miss. 483, 1 So. 625, 60 Am. Rep. 62.

130. Lord v. Langdon, 91 Me. 221, 39 Atl. 552; Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81.

§ 84. **Power of Legislature to delegate authority to municipality.**—The legislature may confer upon a municipal corporation the power to declare what shall constitute a nuisance,[131] and to provide for the abatement of the same.[132] A right conferred by statute on a town to summarily abate a nuisance, confers no right not possessed at common law and is not exclusive of a resort to the courts.[133] So, the legislature has the right to delegate to the mayor and aldermen of a city the power to order the owner to fill his land and upon his refusal or neglect so to do, to fill it for him at his expense and to do all that is reasonably necessary to accomplish it.[134] Where, however, the nuisance is caused by the negligence of the city in grading its streets, the expense should not be charged to the owner of the land but to the city.[135] Again, a municipality may be authorized by the legislature to prohibit the maintenance of bowling alleys in certain sections of the municipality.[136]

131. Roberts v. Ogle, 30 Ill. 459, 83 Am. Dec. 201; State v. Noyes, 30 N. H. 279.

132. Roberts v. Ogle, 30 Ill. 459, 83 Am. Dec. 201. But see Hutton v. City of Camden, 39 N. J. L. 122, 23 Am. Rep. 203, holding that the legislature has no power to authorize a board of health to summarily abate a public nuisance without notice to the one maintaining it.

133. American Furniture Co. v. Batesville, 139 Ind. 77, 38 N. E. 408, so holding in construing Ind. Rev. St. 1894, § 4357, subd. 4, conferring such power upon towns. As to power of municipality to summarily abate or remove nuisances, see Chap XIV, herein.

134. Bancroft v. City of Cambridge, 126 Mass. 438; Patrick v. City of Omaha (Neb.), 95 N. W. 477. See Lasbury v. McCague, 56 Neb. 220, 76 N. W. 862.

135. Pathrick v. City of Omaha, (Neb.), 95 N. W. 477.

136. State v. Noyes, 30 N. H. 279. As to bowling alleys a nuisance see § 109, herein.

CHAPTER VII.

Trade or Business.

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§ 85. **Trade or business generally.**— What constitutes a nuisance with reference to the carrying on of a trade or business is a question of fact which is not easy to determine.[1] Many elements enter into the consideration of the question of whether a certain trade, business or enterprise constitutes a nuisance. It may, however, be stated generally, that a person can not carry on a trade or business which causes a substantial injury to another either as to his personal or property rights, in the absence either of a prescriptive right or of some covenant, grant, license or privilege.[2] "Any business, however lawful in itself, which, as to a dwelling house, near which it is carried on, causes annoyances which materially interfere with the ordinary physical comfort of human existence, is a nuisance which should be restrained."[3] If a trade or business so carried on creates a nuisance as to the individual merely, the one maintaining it will be liable to a suit therefor by such individual,[4] or if it creates a nuisance as to the public he will

1. Attorney-General v. Cleaver, 18 Ves. 211.

2. Snider Preserve Co. v. Beeman, 22 Ky. Law Rep. 1527, 60 S. W. 849; Boston Ferrule Co. v. Hills, 159 Mass. 147, 34 N. E. 85, 20 L. R. A. 844; Robinson v. Baugh, 31 Mich. 290; Davis v. Niagara Falls Power Co., 171 N. Y. 336, 64 N. E. 4, 57 L. R. A. 545, aff'g 67 N. Y. Supp. 1131; Robinson v. Kilbert, 58 L. J. Ch. 392, 61 L. T. 60, 41 Ch. 6, 88, 37 W. R. 545; Montreal St. Ry. Co. v. Gareau, Rap. Jud. Queb. 10 B. R. 417.

3. Herbert v. Rainey, 54 Fed. 248, 251, per Acheson, C. J.

4. Robinson v. Kilbert, 58 L. J. Ch. 392, 61 L. T. 60, 41 Ch. D. 88, 37 W. R. 545.

be liable to an indictment for the same.[5] And an injunction restraining the carrying on of a business, which is a nuisance *per se* until there has been a final hearing, will be granted where it satisfactorily appears that this is essential to properly protect the rights of a complainant.[6] So, where a person is substantially injured by the vibrations, smoke and soot from the carrying on of a business, the proprietor of such business will be liable therefor.[7] And where a person erected a high tower on his premises upon which, in the winter time, ice formed from the spray of a large cataract nearby and, when a thaw occurred, fell upon and injured a building on adjacent property and endangered life, it was decided that the maintenance of such tower in such a manner as to cause the injury complained of should be perpetually enjoined.[8] And the carrying on of a business so that fumes, acid and sand therefrom pass through holes in the floor which are used for necessary belting to run machinery, and injure the goods and machinery of a person in business on the floor below, constitutes a nuisance which may be enjoined.[9] So, where the waste from a canning factory caused a nuisance which injured the business of an adjoining owner, the proprietor of such factory was held liable therefor.[10] And one establishing an electric pumping station has been held liable for permanent damages to property injured by such plant.[11] Nor is it any defense to an action of this kind that a similar objection might be made to a like establishment maintained by the plaintiff.[12] It has, however, been decided that the carrying on of a trade not in itself noxious, does not become a nuisance merely because it does harm to some particular trade of an exceptionally delicate nature on adjoining property where it would not interfere with or

5. State v. Wetherell, 5 Har. (Del.) 487.

6. Smith v. Cummings, 2 Pars. Eq. Cas. 92.

7. Montreal St. Ry. Co. v. Gareau, Rap. Jud. Queb. 10 B. R. 417. As to smoke see §§ 135-155, herein. As to vibrations see §§ 188-190, herein.

8. Davis v. Niagara Falls Power Co., 171 N. Y. 336, 64 N. E. 4, 57 L. R. A. 545, aff'g 67 N. Y. Supp. 1131.

9. Boston Ferrule Co. v. Hills, 159 Mass. 147, 34 N. E. 85, 20 L. R. A. 844.

10. Snider Preserve Co. v. Beeman, 22 Ky. Law Rep. 1527, 60 S. W. 849.

11. Davie v. Montreal Water & Power Co., Rap. Jud. Que. 23 C. S. 141.

12. Robinson v. Baugh, 31 Mich. 290.

injure an ordinary trade.[13] And where a town brought an action to restrain the carrying on of a manufacturing business in a certain building on the ground that it constituted a public nuisance, it was decided that the court would grant no relief, there being no allegation that any damages of a special nature had been received by the plaintiff in its corporate capacity.[14] And damages for a permanent injury to land caused by the construction and operation of a mill, have been held not recoverable where it appears that the value of plaintiff's land has been increased thereby to an amount in excess of any injury which has been sustained.[15] Again, the carrying on of banking operations contrary to the statute has been held not to be such a mischief or public nuisance that a court of equity would grant an injunction to restrain the same even though it had jurisdiction over public nuisances.[16]

§ 86. **Evidence upon question of nuisance.**—In an action by one claiming to have been injured in his dwelling by a nuisance caused by the operation of a factory, evidence is admissible to show that other dwellings in the vicinity have been likewise affected.[17] So, where plaintiff claimed to have been injured in his dwelling by dust and other impurities resulting from the operation of a mill, he was permitted to show that other dwellings in that vicinity were also affected by impurities from the mill, such evidence tending to show, not the amount of impurities cast upon plaintiff's property, but rather that the mill inflicted the injury complained of by him.[18] In a case in Indiana, however, it is decided that, in an action by one to recover damages for injury to his property from the operation of a grist mill, evidence that another person has lived within a short distance of both the mill and of plaintiff's house and has suffered no injury therefrom, is not ad-

13. Robinson v. Kilvert, 58 L. J. Ch. 392, 41 Ch. D. 88, 61 L. T. 60, 37 W. R. 545. But see Cooke v. Forbes, 37 L. J. Ch. 178, 17 L. T. 371, L. R. 5 Eq. 166.

14. Inhabitants of Winthrop v. New England Chocolate Co., 180 Mass. 464, 62 N. E. 969.

15. Chicago Forge & Bolt Co. v. Sauche, 35 Ill. App. 174.

16. Attorney-General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Attorney-General v. Bank of Niagara, 1 Hopk. Ch. (N. Y.) 354.

17. Hoadley v. Seward & Son Co., 71 Conn. 640, 42 Atl. 997.

18. Cooper v. Randall, 59 Ill. 317.

missible.[19] Again, in an action by one to enjoin the operation of a factory on the ground that it constitutes a nuisance affecting him in the enjoyment of his home, evidence is admissible as bearing upon the question of whether the injunction should be granted, of personal injury and physical suffering sustained by his family in consequence thereof.[20]

§ 87. **Need not endanger health.**— It is not necessary in order to render a trade or business a nuisance that it should be injurious to health, it being sufficient if it causes substantial discomfort or materially disturbs one in the ordinary comforts of life.[21] So, one carrying on a trade or business which produces noxious smells affecting the general public, may be indicted for maintaining a common nuisance though the smells are not injurious to health.[22]

§ 88. **Injury must be substantial.**—Every trifling annoyance which a person may sustain as the result of the carrying on of a trade or business does not constitute a nuisance. The injury must be real, not imaginary. To constitute a nuisance, in this class of cases, there must be a substantial interference with the ordinary comfort and enjoyment of life, or with the use of property, or some injury to property.[23] So, in an action for injury from the

19. Hindson v. Densmore, 68 Ind. 391.

20. Hoadley v. Seward & Son Co., 71 Conn. 640, 42 Atl. 997, holding that such evidence is admissible "not to show that other persons might have a cause of action against the defendant, but to show that the operations of the defendant's factory created a nuisance. If other persons than the plaintiff, situated in respect to the defendant's factory substantially as he was, suffered therefrom the same kind of hurt, inconvenience and damage that he did, then the experience of the others tended to establish the claim of the plaintiff." Per Andrews, C. J.

21. Howard v. Lee, 3 Sandf. (N. Y.) 281; Catlin v. Valentine, 9 Paige (N. Y.), 575, 38 Am. Dec. 567; Brady v. Weeks, 3 Barb. (N. Y.) 157. See §§ 85, 93, 129, 138, 163, 166 183, herein.
herein.

22. State v. Wetherell, 5 Har. (Del.) 487.

23. Cooper v. Randall, 59 Ill. 317; Owen v. Phillips, 73 Ind. 284; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, 9 L. R. A. 737; Butterfield v. Klaber, 52 How. Prac. (N. Y.) 255; Farrell v. New York Steam Co., 23 Misc. R. (N. Y.) 726, 53 N. Y. Supp. 55; Goodall v. Crofton, 33 Ohio St. 271, 31 Am. Rep. 535; Tiede v. Schmeidt, 105 Wis. 470, 81 N. W. 826; Robinson v. Kilvert, 58 L. J. Ch. 392, 61 L. T. 60, 41 Ch.

operation of a flour mill it has been decided that the plaintiff must show either a substantial injury to himself or to his property. There must be a wrongful invasion of a legal right and the damage therefrom must be serious and substantial.[24] So, an instruction that the law does not give damages for every trifling injury is proper.[25] Where an injunction is asked for, if there is any doubt as to the complainant's right thereto, and the industry is a lawful one and of public utility, it will not be granted.[26]

§ 89. **Duty as to care and use of appliances.**—Carrying on a lawful trade in the usual manner is not necessarily the carrying it on in a reasonable and proper manner.[27] A person carrying on a trade or business should exercise a due regard for the rights of others and is under the obligation to use ordinary care so as to avoid unnecessary annoyance.[28] Machinery should be used in a reasonable and ordinary manner and an excessive or unreasonable use thereof which causes inconvenience, annoyance or injury to another may be restrained,[29] or the ground of an action for damages.[30] If by the use of customary precautions and of approved appliances he can avoid injury to another, it is his duty to make use of such precautions and appliances.[31] A person is not, however, relieved from liability for a nuisance created by him in such cases by the fact that the business is so conducted as to create the least possible annoyance.[32] If one uses his own land for the prosecu-

D. 88, 37 W. R. 545. See §§ 137, 162, 182, herein.

24. Owen v. Phillips, 73 Ind. 284.

25. Cooper v. Randall, 59 Ill. 317.

26. English v. Progress Electric Light & M. Co., 95 Ala. 259, 10 So. 134. See Butterfield v. Klaber, 52 How. Prac. (N. Y.) 255.

27. Stockport Waterworks Co. v. Potter, 31 L. J. Ex. 9, 7 H. & N. 160, 7 Jur. N. S. 880.

28. Over v. Dehne (Ind. App. 1905), 75 N. E. 664; Owen v. Phillips, 73 Ind. 284. See Seacord v. People, 121 Ill. 623, 13 N. E. 194.

29. Bowden v. Edison Electric Illum. Co., 29 Misc. R. (N. Y.) 171, 60 N. Y. Supp. 835.

30. Piehl v. Albany R. Co., 30 App. Div. (N. Y.) 166, 51 N. Y. Supp. 755.

31. Hill v. Schneider, 13 App. Div. (N. Y.) 299, 43 N. Y. Supp. 1.

32. Winslow v. City of Bloomington, 24 Ill. App. 647; Moses v. State, 58 Ind. 185; McAndrews v. Collerd, 42 N. J. L. 189, 192, 36 Am. Rep. 508; People v. Burtleson, 14 Utah, 258, 263, 47 Pac. 87; Pennoyer v. Allen, 56 Wis. 502, 512, 14 N. W. 609, 43 Am. Rep. 728; Stockport Waterworks Co. v. Potter, 7 H. & N. 167.

tion of some business from which injury to his neighbor ensues, as where noxious smells or gases are emitted therefrom, he is liable therefor even though he may have used reasonable care in the prosecution of such business.[33] So, if a business is a nuisance the defendant will not, on indictment, be entitled to an acquittal because the premises were kept in as cleanly a manner as they could be kept in the reasonable prosecution of the business.[34] So, it is no defense to a prosecution for maintaining a nuisance, consisting of smoke, soot, and noxious gases and vapors from a manufacturing establishment that the business is carried on in a careful and prudent manner and that nothing has been done by those managing it that was not a reasonable and necessary incident of the busiess.[35]

§ 90. **Where nuisance can be avoided.**—Where a business can be so carried on that it will not constitute a nuisance an injunction restraining the carrying on of such business will not be issued, but the court will so frame its order that the business may be continued provided it is so conducted as not to create a nuisance.[36] So, where a person is injured by the smell from a market place owing to the fact that the yards where the cattle are enclosed are not kept clean, the maintenance of the market place will not be enjoined but the court will require that the yards be kept in a clean condition where this can be done, and it will avoid the nuisance com-

"All persons have the right to insist that a business in any degree offensive or dangerous to them shall be carried on with such improved means and appliances as experience and science may suggest or supply, and with such reasonable care as may prevent unnecessary inconvenience to them. By such care and improved methods and appliances, many occupations formerly regarded as nuisances may now be carried on, even in populous neighborhoods, without annoyance to any one." Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 421, 47 N. E. 2, 37 L. R. A. 381, 62 Am. St. R. 537, per Howard, J.

33. Frost v. Berkeley Phosphate Co., 42 S. C. 402, 20 S. E. 280, 26 L. R. A. 693, 46 Am. St. R. 736; Price v. Oakfield Highland Creamery Co., 87 Wis. 536, 24 L. R. A. 333, 58 N. W. 1039. As to smells see §§ 157-173, herein.

34. State v. Ball, 59 Mo. 321, 323.

35. People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722. As to smoke see §§ 135-155, herein.

36. Chamberlain v. Douglass, 24 App. Div. 582, 48 N. Y. Supp. 710. See § 91, herein.

plained of.[37] And where a laundry business is so carried on as to be a nuisance and warrant the interference of equity, yet a special injunction has been so modified as to permit defendants to conduct such business if they can so alter and change the mode of carrying it on as not to occasion damage or annoyance to the plaintiff.[38] And where it did not appear from the record, but that a smoke-stack might have been used in such a way both readily and easily, as that smoke would not have issued therefrom, the court said: "But be that as it may . . . we do not see why the plaintiff should not be restrained from so using his smoke-stack as that the soot issuing therefrom shall be prevented from being a disturbance, annoyance, and source of positive injury to the defendant and his property."[39] In a case in Alabama, however, where an electric light was complained of as a nuisance, it was decided that it not only would not be enjoined, but that the complainant would be left to his legal remedy, it appearing that by the adoption of improved appliances the injuries complained of could be avoided or at least so diminished that they would not be in excess of those which were ordinarily incident to life in the city.[40] Where a decree is entered requiring a defendant to do certain things to avoid the nuisance and also forbidding him from permitting it to exist, he cannot relieve himself from contempt by showing that he has complied with the order as to the adoption of the prescribed methods to prevent the nuisance where it appears that such methods did not accomplish the desired result, since in such case he should adopt other means to avoid it, or discontinue the business if all methods fail, as only by such a course will he be regarded as having obeyed the injunction.[41] A court, however, has no power to deal with the manner in which the proprietor of a business shall arrange a part of his premises so as to lessen an annoyance, such as a noise, caused by the carrying on of such business, where he is not amen-

37. Miller v. Webster City, 94 Iowa, 162, 62 N. W. 648.

38. Warwick v. Wah Lee & Co., 10 Phila. (Pa.) 160, 31 Leg. Int. 268. As to laundries see § 122, herein.

39. Sullivan v. Royer, 72 Cal. 248, 250, 251, 13 Pac. 655, 1 Am. St. Rep. 51. See as to action for removal smokestack § 138, herein.

40. English v. Progress Electric Light & M. Co., 95 Ala. 259, 10 So. 134.

41. Northwood v. Barber Asphalt Pav. Co., 126 Mich. 284, 85 N. W. 724, 54 L. R. A. 454.

able to the court by reason of the character of the case against him, as where a nuisance has not been established.[42]

§ 91. **Where nuisance obviated after action commenced.**— Where an action has been brought to restrain the carrying on of a business in such a manner as to create a nuisance and to recover damages and it appears that the nuisance, which existed at the time the action was commenced, has been obviated by a change in the mode of conducting the business so that it no longer exists, no injunction will be granted.[43] There may, however, in such a case be a recovery by the plaintiff of damages for such injury as has been sustained by him.[44]

§ 92. **Negligence as an element.**— Where a business is of itself a nuisance, one who has been injured thereby may maintain an action for such injury, though no negligence exists, negligence not being an essential element in such case.[45] But where a business is lawful and properly conducted, it is not a nuisance *per se*. It may, however, be so negligently conducted as practically to become a nuisance, in which case negligence must be shown to entitle a plaintiff to recover damages.[46]

§ 93. **Effect on persons of ordinary sensibility the test.**— The test of whether a trade or business is a nuisance, is to be determined by its effect upon persons of ordinary sensibility. It is not enough that it may be annoying to persons of delicate nature or extreme sensitiveness. The fact that it may be annoying or

42. Scott v. Houpt, 8 Kulp. (Pa.) 42. As to noises see §§ 174-191, herein.

43. Miller v. Edison Electric Illuminating Co., 66 App. Div. (N. Y.) 470, 73 N. Y. Supp. 376, reversing 68 N. Y. Supp. 900.

44. Moon v. National Wall Plaster Co., 31 Misc. R. (N. Y.) 631, 66 N. Y. Supp. 33.

45. Bohan v. Port Jervis Gaslight Co., 122 N. Y. 18, 25 N. E. 246, 33 N. Y. St. R. 246, 9 L. R. A. 711, affirming 45 Hun, 257, 10 N. Y. St. R. 374.

46. Dunsbach v. Hollister, 49 Hun (N. Y.), 352, 353, 17 N. Y. St. R. 461, 2 N. Y. Supp. 94, aff'd 132 N. Y. 602, 30 N. E. 1152, 44 N. Y. St. R. 934. See Piehl v. Albany R. Co., 30 App. Div. (N. Y.) 166, 51 N. Y. Supp. 755. See § 89, herein, as to "Duty as to care and use of appliances."

offensive to one who is ill, or afflicted with extreme nervousness, or by reason of his being accustomed to an elegant and dainty mode of life, will not, of itself, render it a nuisance. The annoyance or injury must be one affecting a person of the average mental and physical condition.[47]

§ 94. **Intention does not affect.**— The intention of a person in establishing or carrying on a business does not affect the determination of the question of whether such business constitutes a nuisance. If it in fact appears that a person has sustained a substantial injury either as to his home, or the ordinary comforts of life, or in the use of his property by a business established and maintained by another, the intention of the latter is immaterial.[48]

§ 95. **Effect of locality—Convenient place.**— Locality may constitute an important element in determining whether or not an act is a nuisance.[49] A trade or business may be a nuisance in one locality and not in another,[50] and it is no answer that the business was carried on in a convenient place, when it is in fact a nuisance.[51]

47. Ruff v. Phillips, 50 Ga. 130; Davis v. Whitney, 68 N. H. 66, 44 Atl. 78; Butterfield v. Klaber, 52 How. Pr. (N. Y.) 255; Columbus Gaslight & Coke Co. v. Freeland, 12 Ohio St. 392; Appeal of Ladies' Decorative Art Club (Pa., 1888), 13 Atl. 537; Powell v. Bentley & Gerwig Furn. Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; McCann v. Strang, 97 Wis. 551, 72 N. W. 1117. See §§ 137, 163, 183, herein.

48. Bonnell v. Smith, 53 Iowa, 281, 5 N. W. 128. It was said by the court in this case: "Upon the question as to whetner an act constitutes a nuisance it is not necessary to inquire into the intention of the person doing the act. The best intentions cannot prevent an act from being a nuisance where it otherwise is such, and the worst intentions cannot make an act a nuisance where it otherwise is not. The intention might, to be sure, be a proper subject of inquiry upon the question of exemplary damages." Per Adams, Ch. J. See §§ 92, 99, 161, 167, herein.

49. Owen v. Phillips, 73 Ind. 284, 295; Commonwealth v. Miller, 139 Pa. 77, 21 Atl. 138, 27 W. N. C. 257; St. Helens Smelting Co. v. Tipping, 11 H. L. Cas. 642, 35 L. J. Q. B. 66, 13 W. R. 1083, 12 L. T. 776, 11 Jur. 785. See §§ 54, 96, 97, 98, 127, 128, 140, 165, 184, 186, 203, herein, as to effect of locality.

50. Hurlburt v. McKone, 55 Conn. 31, 10 Atl. 164. See §§ 54, 96, 97, 98, 127, 128, 140, 165, 184, 186, 203, herein.

51. Bamford v. Turnley, 3 B. & S. 62, 31 L. J. Q. B. 286, 9 Jur. N. S. 377, 10 W. R. 803. See Carey v. Led-

A business which is not a nuisance, *per se* may become a nuisance by reason of its location in a residential neighborhood where its operation renders the homes uncomfortable.[52] So, where the residents of a populous community are affected with headache and nausea and are injured in their health by reason of the smoke, soot and noxious gases caused by the carrying on of a business in that community, it has been decided that such business constitutes a public nuisance which may be abated.[53] And although there were a number of manufacturing establishments in the neighborhood in which defendant's mill was located, such mill was held to be a nuisance where it appeared that the operation of the machinery rendered conversation in plaintiff's home difficult, and caused a jarring of the house, and that the smoke and dust therefrom not only soiled clothes hung out to dry but also injured the interior decorations and contents of his dwelling.[54]

§ 96. **Same subject—Continued.**—There are, however, many inconveniences and annoyances to which a person living in a city must submit as incidents of the city life.[55] So, in a leading case it

better, 13 C. B. N. S. 470, 32 L. J. C. P. 104, 6 L. T. 721, 10 W. R. 803.

So it has been declared in a somewhat recent case that "We take the law to be well settled that, in questions of this kind, the question whether the place where the trade or business is carried on is a proper and convenient place for the purpose, or whether the use by the defendant of his own land is under the circumstances a reasonable use, are questions that ought not to be submitted to the finding of a jury. . . . The proper question for the jury was whether the operation of the factory interfered with the reasonable and comfortable enjoyment by the plaintiffs of their property, or occasioned material injury to the property itself." Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 572, 573, 63 Am. St. Rep. 533, 39 Atl. 27, per Bryan, J.

52. McMorran v. Fitzgerald, 106 Mich. 649, 64 N. W. 569, 58 Am. St. R. 511; Rodenhausen v. Craven, 141 Pa. 546, 21 Atl. 774, so holding where a carpet cleaning establishment was located in a neighborhood devoted to private residences and rendered plaintiff's home uncomfortable by the dust and moths from the carpets in the process of cleaning.

53. People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722.

54. Hurlburt v. McKone, 55 Conn. 31, 10 Atl. 164, 3 Am. St. R. 17.

55. Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 568, 39 Atl. 270, 63 Am. St. R. 533; Robinson v. Baugh, 31 Mich. 290; Eller v. Koehler, 68, Ohio St. 51, 67 N. E. 89, 12

is said: "According to our settled notions and habits, there are convenient places, one for the home, one for the factory; but, as often happens, the two must be so near each other as to cause some inconvenience. The law cannot take notice of such inconveniences, if slight or reasonable, all things considered, but applies the common sense doctrine that the parties must give and take, live and let live; for here extreme rights are not enforceable rights, at any rate not by injunction."[56] And where one carries on the business of finishing steam boilers in the compact part of a city, whereby the occupant of an adjoining dwelling is seriously annoyed by the noise and dust, it has been decided that the latter may maintain an action on the case against the former.[57] So, a soap boiling establishment in a city which renders life uncomfortable, constitutes a nuisance.[58] And a glass factory has been held to be a nuisance where located in a city in a section in which there are no other factories, and adjacent to a hotel, where the offensive noises and smoke therefrom were such that guests refused to accept rooms in certain parts of the hotel.[59] Thus, if one is living in a section of a city which is given over to manufacturing industries, he may be required to submit to greater annoyances than if he were living in a strictly residential part of the same city.[60] So, in an action against one for an alleged injury from the operation of machinery on an adjoining lot, it was held error to refuse in behalf of the defendant to instruct the jury that: "In determining the question whether the plaintiff has suffered actual substantial and material injuries, you may consider the locality of her property and that

Am. Neg. R. 89; Huckenstine's Appeal, 70 Pa. 102, 107, 10 Am. Rep. 669; St. Helens Smelting Co. v. Tipping, 11 H. L. Cas. 642, 35 L. J. Q. B. 66, 13 W. R. 1083, 12 L. T. 776, 11 Jur. 785. See §§ 140, 165, 184, herein.

56. Powell v. Bentley & Gerwig Furn. Co., 34 W. Va. 804, 809, 12 S. E. 1085, 12 L. R. A. 53, per Holt, J., citing Bishop Cont. § 418.

57. Fish v. Dodge, 4 Denio (N. Y.), 311, 47 Am. Dec. 254. As to noises see §§ 174-191, herein.

58. Winslow v. Bloomington, 24 Ill. App. 647; Howard v. Lee, 3 Sandf. (N. Y.) 281. As to fat and bone boiling establishments see § 116, herein.

59. Leeds v. Bohemian Art Glass Works, 65 N. J. Eq. 402, 54 Atl. 1124.

60. Robinson v. Baugh, 31 Mich. 290; Hafer v. Guyman, 7 Pa. Dist. R. 21, 20 Pa. Co. Ct. 321. See Gilbert v. Showerman, 23 Mich. 448.

of the defendant, the nature of the business that is being conducted by the defendant, the character of the machinery that he is using, the manner of using the property producing the alleged injuries; and you may also consider the kinds of business, if any, which are being conducted and carried on in the vicinity of these properties. . . . If you find from the evidence that the plaintiff's property is situated in a populous city, and in the vicinity of other shops of the same, or substantially the same character and kind, then you may consider this fact in determining whether the plaintiff has suffered injuries of the kind named. A party dwelling in a populous city, and in the vicinity of shops and factories, cannot have the same quiet and freedom from annoyances that he would have in the country or in other districts. If these annoyances, should you so find them to be such, are either trifling in their nature, or are such as under the particular circumstances of this case do not cause real, substantial, and material injuries, then so findings, the plaintiff could not recover."[61] So, the operation of cement works, located in a manufacturing district, will not be restrained as a nuisance on account of the dust therefrom, it appearing that the dust from other factories and from the streets causes equally as much annoyance and injury as that from the works complained of.[62] There is, however, a limit to the discomforts and annoyances to which a party may be required to subject himself without remedy by living in a city or in a manufacturing district.[63] Though a locality may be what is termed a manufacturing locality, one is not obliged to submit to serious annoyances in excess of those resulting from the ordinary uses to which property is there devoted.[64] And if in view of all the circumstances including the locality and the nature and extent of a person's enjoyment of his property prior to the acts complained of the annoyance is such as to constitute a nuisance, an action will lie[65]

61. Eller v. Koehler, 68 Ohio St. 51, 67 N. E. 89, 12 Am. Neg. Rep. 659.

62. Roscoe Lumber Co. v. Standard Silica Cement Co., 62 App. Div. (N. Y.) 421, 70 N. Y. Supp. 1130.

63. Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 569, 39 Atl. 270, 63 Am. St. R. 533.

64. Mulligan v. Elias, 12 Abb. Pr. N. S. (N. Y.) 259.

65. Bamford v. Turnley, 3 B. & S. 62, 16 W. R. 803, 9 Jur. N. S. 377, 31 L. J. Q. B. 286.

§ 97. Change in character of locality—Coming into nuisance.—Though a trade or business may not have been a nuisance at the time and place of its original location, yet it may become so by reason of the development of the locality, as in the case of an increase of population and extension of the limits of an adjacent city or town.[66] And where owing to such growth or development a business becomes a nuisance, it has been decided that it should be removed.[67] So, it is said in a case in Pennsylvania that: "Carrying on an offensive trade for any number of years in a place remote from buildings and public roads, does not entitle the owner to continue it in the same place, after houses have been built and roads laid out in the neighborhood, to the occupants of which and travelers upon which, it is a nuisance. As the city extends such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residence of the citizens. This, public policy, as well as the health and comfort of the population of the city, demand."[68] And the fact that a trade or business may have been continued for a sufficient length of time to confer a right by prescription, under some circumstances, to maintain it, will not, in this class of cases, confer any right to continue the same after it has become a nuisance.[69] But if one erects a dwelling house among mills and factories in which the machinery is run by steam power, he must expect to suffer the ordinary inconveniences and annoyances which are inseparable from such establishments.[70]

§ 98. Change in locality from residence to business or trade.—Where the character of a section has been changed from a residence to a manufacturing and business centre, it has been decided that one who owns a residence in that locality cannot recover dam-

66. Ashbrook v. Commonwealth, 1 Bush (Ky.), 139, 89 Am. Dec. 616. See §§ 54, 98, 128, 140, 165, 184, herein.

67. Laflin & R. Powder Co. v. Tearney, 131 Ill. 322, 21 N. E. 516. 23 N. E. 389, 7 L. R. A. 262, 19 Am St. R. 34; Kansas City v. McAleer 31 Mo. App. 433; Brady v. Weeks, 3 Barb. (N. Y.) 157, 159. But see Rex v. Cross, 2 Car. & P. 483, 31 R. R. 684.

68. Weir's Appeal, 74 Pa. St. 230.

69. Ashbrook v. Commonwealth, 1 Bush (Ky.), 139, 89 Am. Dec. 616. See, also, § 54, herein.

70. Owen v. Phillips, 73 Ind. 284, 295. See, also, Lambeau v. Lewinski, 47 Ill. App. 656.

ages for annoyances caused by the operation of a lawful business, which is necessary in the town, located in accordance with directions from the local authorities, and which causes no more annoyance than is ordinary and necessary.[71] So, in this connection it has been declared that where a street in a city ceases to be used or occupied as a place of residence and is changed into a place of business, no one or two persons who may desire to continue to reside therein or who persist in residing there should be allowed to prevent the carrying on of a lawful and useful trade in such street, because they are or may be subjected to annoyances or even loss thereby, as it would be better that they should go elsewhere than that the public should be inconvenienced by arresting a necessary and useful business.[72]

§ 99. **Fact that business is lawful is immaterial.**—A lawful business located in a proper place and conducted in a proper manner, cannot be treated as a nuisance *per se*, although it may be so conducted or the surrounding circumstances may be such as to make it a nuisance.[73] So, it has been declared in one case that "a lawful as well as unlawful business may be carried on so as to prove a nuisance. The law in this respect looks with an impartial eye upon all useful trades, avocations and professions. However ancient, useful or necessary the business may be, if it is so managed as to occasion serious annoyance, injury or inconvenience, the injured party has a remedy. Though the nuisance be public, rendering the guilty party liable to indictment, the sufferer may recover compensation in a civil suit, proving special and peculiar damage to himself."[74] So, a nuisance may be produced by offensive sounds in the prosecution of a business lawful *per se*,[75] or by the carrying on of such a business at unreasonable hours to the

71. Robins v. Dominion Coal Co., Rap. Jud. Queb. 16 C. S. 195.

72. Doellner v. Tynan, 38 How. Prac. (N. Y.) 176, per Morrell, J.

73. Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 420, 47 N. E. 2, 62 Am. St. R. 532, 37 L. R. A. 381, per Howard, J.; Dunsbach v. Hollister, 49 Hun (N. Y.), 352, 17 N. Y. St. R. 461; Pennoyer v. Allen, 56 Wis. 502, 14 N. W. 609, 43 Am. Rep. 728.

74. Norcross v. Thoms, 51 Me. 503, 504, 81 Am. Dec. 588, per Dickerson, J.

75. Bishop v. Banks, 33 Conn. 118, 121, 87 Am. Dec. 197. See § 185, herein.

discomfort of those residing in the neighborhood.[76] The lawful character of the results of an occupation, trade or mechanical art, or the care with which it is carried on, cannot presume a right of action by those whose enjoyment of life and property is disturbed by the mode or means of conducting such trade or mechanical art. There is a distinction, however, not always easily defined between acts which may be done on one's own premises, although to the injury of adjoining premises or their appurtenances without responsibility therefor and those which may not.[77] As a general rule, any business or trade, however lawful, which materially injures the property of another, or affects his health, or materially interferes with the ordinary comfort and enjoyment physically of life, constitutes a nuisance.[78] It is generally true that the rule is of universal application that while a man may prosecute such business as he chooses on his own premises, he has no right to erect and maintain a nuisance to the injury of an adjoining proprietor, or of his neighbor, even in the pursuit of a lawful trade.[79] The law does not allow anyone, whatever his circumstances or condition may be, to be driven from his home, or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business carried on in his vicinity. The maxim, *sic utere tuo ut alienum non laedas,* expresses the well established doctrine of the law.[80]

76. Dennis v. Eckhardt, 3 Grant Cas. (Pa.) 390.

77. McKeon v. See, 27 N. Y. Super. (4 Rob.) 449, 465, *et seq*, aff'd 51 N. Y. 300, 10 Am. Rep. 659.

78. Barber v. Union Woolen Co., 42 Conn. 399, 402; Wahle v. Reinbach, 76 Ill. 322, 326; Seacord v. People, 22 Ill. App. 279, affirmed 121 Ill. 623, 13 N. E. 194; Susquehanna Fertilizer Co. v. Spangler, 86 Md. 562, 39 Atl. 270, 63 Am. St. R. 533; Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 276, 20 Atl. 900, 25 Am. St. R. 595, 9 L. R. A. 737; Scott v. Bay, 3 Md. 431, 446; Robinson v. Baugh, 31 Mich. 290; Attorney-General v. Steward & Taylor, 20 N. J. Eq. 415, 417; Cleveland v. Citizens Gas Light Co., 20 N. J. Eq. 201, 205; Wolcott v. Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790; Catlin v. Patterson, 10 N. Y. St. R. 724; Fish v. Dodge, 4 Denio (N. Y.), 311, 47 Am. Dec. 254; McClung v. North Bend Coal and Coke Co., 9 Ohio Cir. Ct. R. 259; Barkan v. Knecht (Ohio), 10 Wkly. Law Bull. 342; Robb v. Carnegie, 145 Pa. 324, 22 Atl. 649, 27 Am. St. R. 694, 699; Dennis v. Eckhardt, 3 Grant Cas. (Pa.) 390; Pennoyer v. Allen, 56 Wis. 502, 14 N. W. 609, 43 Am. Rep. 728.

79. Heeg v. Licht, 80 N. Y. 579, 582, 36 Am. Rep. 654, per Miller, J. See Catlin v. Patterson, 10 N. Y. St. R. 724. But see § 100, following.

80. Ross v. Butler, 19 N. J. Eq.

Therefore, one who carries on a lawful trade or business in such a manner as to prove a nuisance to his neighbor, must answer in damages therefor, and it is not necessary to a right of action that one should be driven from his dwelling, it being enough that the enjoyment of life and property be rendered uncomfortable.[81] So, a person will be enjoined from carrying on a business, however legitimate, which renders a neighbor's dwelling house unfit for protection and which works inconvenience, hurt, annoyance and discomfort to such neighbor.[82] So where a tannery emits smells which substantially impair the comfort and enjoyment of adjacent owners, it will constitute a nuisance though the business is a lawful one, is properly conducted, and the smells are only such as are necessarily incident to such business.[83]

§ 100. **Development of natural resources on one's land.**—Where persons are engaged in a lawful business or industry, consisting of the development of natural resources of land and in which the interests of an entire community are concerned and large expenditures have been made, as in the case of the operation of coal mines, they are at liberty to carry on that business in the ordinary way and while so doing are not accountable for circumstances which they cannot control as where, by the operation of such mines in the usual way, a natural drainage stream is rendered impure by the draining or pumping of percolating water into the land. The damage resulting in such a case is declared to be *damnum absque injuria*.[84] As was said by the court in this case: "It will be observed that the defendants have done nothing to change the character of the water, or to diminish its purity, save what results from the natural use and enjoyment of their own property. They have brought nothing on to the land artificially. The water which formed into Meadow Brook is the water which

294, 298, 97 Am. Dec. 654, per The Chancellor.

81. Bohan v. Port Jervis Gaslight Co., 122 N. Y. 18, 23, 33 N. Y. St. R. 246, 25 N. E. 246, 9 L. R. A. 711, affirming 45 Hun, 257, 10 N. Y. St. R. 374.

82. Pennsylvania R. I. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432.

83. Pennoyer v. Allen, 56 Wis. 502, 14 N. W. 609, 43 Am. Rep. 728.

84. Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445.

the mine naturally discharges; its impurity arises from natural, not artificial, causes. The mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharge is the necessary incident to the running of it. It must be conceded, we think, that every man is entitled to the ordinary and natural use and enjoyment of his property; he may cut down the forest trees, clear and cultivate his land, although in so doing he may dry up the sources of his neighbor's springs, or remove the natural barriers against wind and storm. If, in the excavation of his land, he should uncover a spring of water, salt or fresh, acidulated or sweet, he will certainly not be obliged to cover it up again, or to conduct it out of its course, lest the stream, in its natural flow, may reach his neighbor's land. It has always been considered that land on a lower level owes a natural servitude to that on a high level, in respect of receiving without claim for compensation by the owner, the water naturally flowing down to it. . . . The right to mine coal is not a nuisance in itself; it is, as we have said, a right incident to the ownership of coal property, and where exercised in the ordinary manner, and with due care, the owner cannot be held for permitting the natural flow of mine water over his own land, into the watercourse, by means of which the natural drainage of the country is effected. There are, it is well known, percolations of mine water into all mines; whether the mine be operated by tunnel, slope or shaft, water will accumulate, and, unless it can be discharged, mining must cease. The discharge of this acidulated water is practically a condition upon which the ordinary use and enjoyment of coal lands depends; the discharge of the water is therefore part and parcel of the process of mining, and as it can only be effected through natural channels, the denial of this right must inevitably produce results of a most serious character to this, the leading industrial interest of the State."[85] So, in a recent case it is decided that where property, which is located in a sparsely settled district and is specially adapted for the manufacture of vitrified brick by reason of the slate thereon, which constitutes its chief value, is used for such purpose, and there is no negligence in the operation of the plant and modern methods and appropriate appliances are used and the inconveniences or annoy-

85. Per Mr. Justice Clark.

ance is only slight and such as is the natural and necessary consequences of the right of the owner to develop the resources of his land, he will not be required to abandon his enterprise or be liable to damages.[86]

§ 101. **Trade a nuisance does not render building such.**— The fact that a trade or business constitutes a nuisance does not render the building in which it may be carried on a nuisance, nor render it liable to destruction by way of abating the nuisance caused by the misuse thereof.[87]

§ 102. **Injunction against proposed business.**— The fact that a business which is lawful may become a nuisance after it has been commenced is not a sufficient ground for enjoining the same.[88] It must clearly appear to the satisfaction of the court that it will become a nuisance.[89] So, it has been said in this connection: "Before a court of equity will restrain a lawful work from which merely threatened evils are apprehended, the court must be satisfied that the evils anticipated are imminent and certain to occur.

86. Phillips v. Lawrence Vitrified Brick & Tile Co. (Kans., 1905), 82 Pac. 787. This case was an action for damages and an injunction restraining the carrying on of the business on the ground of smoke, dust, and cinders from the plant, which were cast upon adjoining premises, killing trees and causing other injury. The evidence, which was conflicting, showed no substantial injury. Upon the general question it was said by the court: "The defendant was bound to make a lawful and reasonable use of its property, and if it made an unlawful or unreasonable use, so as to produce material injury or great annoyance to those in the neighborhood, the law will hold it responsible for the consequent damage. The making of brick is a useful and necessary business, and the fact that it may produce some annoyance or discomfort to those nearby does not necessarily justify interference or create civil liability. Ordinarily an owner may make a lawful and reasonable use of his property, although it may cause some annoyance or discomfort to those in the vicinity, if such inconvenience and discomfort are only slight, and are the natural and necessary consequences of the exercise of the owner's rights in developing the resources of his property."

87. Miller v. Burch, 32 Tex. 208, 5 Am. Rep. 242. As to power of municipality to destroy building see Chap XIV, herein.

88. Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 47 N. E. 2, 37 L. R. A. 381.

89. Bowen v. Mauzy, 117 Ind. 258, 19 N. E. 526.

An injunction will not issue to prevent supposed or barely possible injuries.[90]

§ 103. **Injunction against erection of building for a business or trade.**—The erection of a building may be restrained by the court where it appears that such building if erected would be used for a purpose which is a nuisance *per se*.[91] In the case of the proposed erection of a building, it must appear, to justify an injunction against its erection, that it will necessarily constitute a nuisance as in the case of the carrying on of a noisome trade injurious to health and to the comfort and enjoyment of life.[92] And it has been declared that where a building is to be used for manufacturing purposes, the case must be a very strong one which would justify the granting of an injunction restraining its erection.[93] So, an injunction restraining the erection of a steam mill was refused where it did not sufficiently appear from the evidence that the building would, when used for the purpose contemplated, necessarily constitute a nuisance.[94] In another case where the building was to be used for boiling the carcasses of dead animals it was decided that while the court would enjoin the proposed use of the building, it would not enjoin its erection.[95] In a bill for an injunction in such a case all the facts and circumstances should be clearly and definitely stated so that the court may be able to determine whether a nuisance will in fact be created.[96]

§ 104. **Nuisance maintained in another town where it is not complained of.**—In an action by residents of a town who complain of a nuisance caused by the carrying on of a business in a neighboring town, where it is not complained of by the inhabitants

90. Windfall Mfg. Co. v. Patterson, 148 Ind. 414, 47 N. E. 2, 37 L. R. A. 381, per Howard, J.

91. Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221.

92. Ray v. Lynes, 10 Ala. 63, 64, per Ormond, J.

93. Walcott v. Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790.

94. Thebaut v. Canova, 11 Fla. 143.

95. Czarniecki's Appeal (Pa.), 11 Atl. 660. As to fat and bone boiling establishments see § 116, herein.

96. Adams v. Michael, 38 Md. 123, 17 Am. Rep. 576. As to sufficient statement of grounds for injunction, see Rogers v. John Week Lumber Co., 93 N. W. 821.

of the latter, it has been decided that an injunction will not be granted restraining the carrying on of such business in such a manner as to create a nuisance generally, but that the defendant should be enjoined from so conducting it as to create a nuisance to the complainants at their place of residence.[97]

§ 105. **Statute enjoining malicious erection of structure construed.**—Where a statute provides that the malicious erection of structure by a lessee or owner of land with the intention of annoying or injuring any proprietor of adjoining lands, may be enjoined, it has been decided that the malicious quality of the act must be the predominant one; that the question of malice is to be determined by the character, location and use of the structure as well as by an inquiry into the actual motive of the person; and that the acts referred to by such a statute must, as a general rule, go beyond those of petty business competition. So, where persons occupied adjoining stores, one of which came up to the street line and the other was a few feet back, and the proprietor of the latter store had a show case made to place on the platform in front of his store for the purpose, primarily, of displaying his goods to the best advantage, and secondarily of obstructing a view of the goods displayed in the adjoining store and to injure and annoy the proprietor thereof in his use of such store, it was decided that a case had not been shown for the granting of an injunction under the statute.[98]

§ 106. **Bakery.**— A bakery is a lawful buisness and is not a nuisance *per se*. It is a business which is essential in populous communities. The fact that it may cause some annoyance and discomfort to an adjoining owner is not a sufficient ground for granting an injunction restraining its operation though it is located in a residential neighborhood. It must appear that some substantial injury is sustained in such case or that the annoyance complained of is an unnecessary one.[99]

97. Williams v. Osborne, 40 N. J. Eq. 235.

98. Gallagher v. Dodge, 48 Conn. 387, 40 Am. Rep. 182.

99. Alexander v. Stewart Bread Co., 21 Pa. Super. Ct. 526.

§ 107. **Blacksmith shop.**—A blacksmith shop is not a nuisance *per se*,[100] and the use of premises for such a purpose will not be enjoined on the ground that it may become a nuisance, for the business being a lawful and legitimate one it is presumed that it will be properly conducted.[101] Nor will a court ordinarily enjoin the erection of a building to be used for such a purpose,[102] though it has been decided that where such an injunction has been granted, the order will not be disturbed unless it clearly appear that there has been an abuse of discretion.[103] A blacksmith shop may, however, by reason of its location or the manner in which it is conducted be a nuisance. So, a finding that such a shop was a nuisance was held to be authorized where it was shown that it was within a few feet of the plaintiff's hotel and that the plaintiff was injured by the dust, ashes, and cinders therefrom.[104] And where it appeared that the occupants of the adjoining premises were deprived of their rest and sleep owing to the operation of such a shop at unreasonable hours, it was held that an injunction restraining its operation would be granted.[105]

100. Ray v. Lynes, 10 Ala. 63; Whitney v. Bartholomew, 21 Conn. 213; Whitaker v. Hudson, 65 Ga. 43; Bowen v. Mauzy, 117 Ind. 258, 19 N. E. 526; Fancher v. Grass, 60 Iowa, 505, 15 N. W. 302; Marrs v. Fiddler, 24 Ky. Law Rep. 722, 69 S. W. 953; Chambers v. Cramer, 49 W. Va. 395, 38 S. E. 691, 54 L. R. A. 545. See Fancher v. Trudel, 71 N. H. 621, 52 Atl. 443.

101. Chambers v. Cramer, 49 W. Va. 395, 38 S. E. 691, 54 L. R. A. 545.

102. Ray v. Lynes, 10 Ala. 63, in which it is said: "The proposed erection must be such, as in judgment of law, to threaten materially to impair the comfort of the existence of those living near it, to authorize the interference of a court of chancery; and we do not think this can be affirmatively said in advance of a blacksmith shop." Per Ormond, J. See, also, Marrs v. Fiddler, 24 Ky. Law R. 722, 69 S. W. 953.

103. Whitaker v. Hudson, 65 Ga. 43, in which case the court said: "The granting of this injunction by the chancellor shows that the evidence, in his opinion, preponderated in favor of the complainant, and that he would allow a jury to pass thereon, and therefore we will not interfere with his judgment, and we will add, that if he had refused it we should not have reversed it." Per Crawford, J.

104. Norcross v. Thoms, 51 Me. 503, 81 Am. Dec. 588.

105. Peacock v. Spitzelberger, 16 Ky. Law. R. 803, 29 S. W. 877.

§ 108. **Blasting.**—Where, as a result of blasting upon a person's premises, rocks are thrown upon and injure adjoining premises, it is decided that the one upon whose premises the blasting is done is liable for the injury so caused, though there is no negligence on his part.[106] And where a blast was carelessly set off by a contractor on a public work as a result of which stones were thrown against plaintiff's shop, causing his workmen to leave in fear and his business to be suspended, it was held that the plaintiff might recover for the interruption of his business, the measure of damages being the value to him of the work prevented by defendant's negligence, from being done.[107] In a case in New York, however, it has been decided that the use of explosives by a railroad company in excavating for its roadbed does not create a nuisance rendering the company liable without regard to the question of negligence, the blasting being a lawful and necessary act done on the company's own land to fit it for a lawful business.[108] The court said in this case: "The defendant was here engaged in a lawful act. It was done on its own land to fit it for a lawful business. It was not an act which, under all circumstances, would produce injury to his neighbor, as is shown by the fact that other buildings nearby were not injured. The immediate act was confined to its own land, but the blasts, by setting the air in motion, or in some other unexplained way, caused an injury to the plaintiff's house. The lot of the defendant could not be used for its roadbed until it was excavated and graded. It was to be devoted to a common use, that is, to a business use. The blasting was necessary, was carefully done, and the injury was consequential. There was no technical trespass. Under these circumstances, we think, the plaintiff has no legal ground of complaint. The protection of property is doubtless one of the great reasons for government. But it is equal protection to all which the law seeks to secure. The rule governing the rights of adjacent land owners in the use of their property, seeks an adjustment of conflicting interests through a

106. Tremain v. The Cohoes Co., 2 N. Y. 163, 51 Am. Dec. 284; Hay v. The Cohoes Co., 2 N. Y. 159, 51 Am. Dec. 279.

107. Hunter v. Fanen, 127 Mass. 48, 34 Am. Rep. 423.

108. Booth v. Rome, W. O. T. R. Co., 140 N. Y. 267, 35 N. E. 592, 55 N. Y. St. R. 656, 24 L. R. A. 105.

reconciliation by compromise, each surrendering something of his absolute freedom so that both may live. To exclude the defendant from blasting to adapt its lot to the contemplated uses, at the instance of the plaintiff, would not be a compromise between conflicting rights, but an extinguishment of the right of the one for the benefit of the other. This sacrifice, we think, the law does not exact. Public policy is promoted by the building up of towns and cities and the improvement of property. Any unnecessary restraint on freedom of action of a property owner hinders this. The law is interested also in the preservation of property and property rights from injury. Will it in this case protect the plaintiff's house by depriving the defendant of his right to adapt his property to a lawful use, through means necessary, usual, and generally harmless? We think not."[109]

§ 109. **Bowling alleys.**—A bowling alley kept for gain or hire was held to be a public nuisance at common law, the maintenance of which a village corporation, having powers to pass by-laws relating to nuisances, might prohibit,[110] or for which an indictment would be against the keeper.[111] In a recent case, however, where a bill had been filed to restrain the proprietor of a bowling alley

109. Per Andrews, Ch. J. Compare Morgan v. Bowes, 42 N. Y. St. R. 791, 17 N. Y. Supp. 22.

110. Tanner v. Village of Albion, 5 Hill (N. Y.), 121, 40 Am. Dec. 337. The following quotation from this case shows how establishments of this kind were regarded in the earlier decisions. "Establishments of this kind in populous communities are, at best, and even when used without hire, very noisy, and have a tendency to collect idle people together and detain them from their business. When built and kept on foot for gain, the owner is interested to invite and procure as full an attendance as possible, day after day, and for this purpose temptations beyond mere amusement are often resorted to, such as drinking and gaming. So far as I have been able to discover, erections of every kind adapted to sports or amusements, having no useful end, and notoriously fitted up and continued with the view to make a profit for the owner are considered in the books as nuisances. Not that the law discountenances innocent relaxation, but because it has become matter of general observation that when gainful establishments are allowed for their promotion such establishments are usually perverted into nurseries of vice and crime." Per Cowen, J.

111. Bloomhuff v. State, 8 Blackf. (Ind.) 205; State v. Haines, 30 Me. 65.

from permitting anyone to play upon its alley, and from permitting loud and boisterous noises to be made by persons there, a refusal to grant an injunction was sustained. In this case it appeared that at the close of the appellant's evidence, the judge said: "I cannot regulate the noise of a city by injunctions and I am not going to try it. If these people have made any noise there that injured this property, the property of the complainant here, she has her remedy at law; she can go before a jury, and if she can satisfy a jury that her property has been damaged by their act, or by their improper use of their premises, then she can get a verdict." This language the appellate court declared, was a terse expression of its views and said: "The appellant may sue and recover damages in a court of law for any abuse of the right of the appellee to use its own property, but choosing to live in a great city, she must take such life with the inevitable concomitant of city amusements. She cannot require a court of chancery to enjoin them, nor to take charge of their conduct, with the certain following of applications to punish for contempt, with or without cause."[112] And in a later case it is declared that bowling alleys are not necessarily nuisances *per se,* but may be so by reason of their location.[113]

§ 110. **Breweries and distilleries.**—A brewery is not necessarily a nuisance, *per se,*[114] though it may become so from the manner in which it is conducted. So disagreeable odors caused by the flow of impure water from a brewery along the streets of a city in front of a private residence which impair the enjoyment of such property, has been held to be a nuisance which may be enjoined.[115] And where a person erected on his land a distillery and divers slop pools and hog styes and fed the hogs in these pools and styes with the slop from said distillery and permitted slops and offal to pass from the styes into a creek which flowed through and over plaintiff's land, thus causing vapors and stenches to arise therefrom

112. Mende v. Sociala Turn Verein, 66 Ill. App. 591, per Mr. Justice Gary.

113. Harrison v. People, 101 Ill. App. 224.

114. O'Reilly v. Perkins, 22 R. I. 364, 48 Atl. 6; Gorton v. Smart, 1 Sim. & S. 66, 1 L. J. O. S. Ch. 36.

115. Smith v. Fitzgerald, 24 Ind. 316.

and render a dwelling house of plaintiff unwholesome, it was held to constitute a nuisance.[116] But where a proceeding was brought to restrain the erection of a brewery on the ground that it would constitute a nuisance when in operation, it was decided that there being nothing to show that it would, in fact, be a nuisance, a demurrer to the bill was properly sustained.[117]

§ 111. **Brick, lime and lumber kilns.**— A brick kiln is not a nuisance *per se* though it may become a nuisance where by reason of its location the smoke and noxious gases therefrom cause material discomfort to the occupants of neighboring residences.[118] So, the maintaining of a brick kiln by one upon his premises so as to be materially offensive to his neighbor, or to injure the property of another, or to expose it to danger, constitutes a nuisance which may be enjoined.[119] And likewise a lime kiln may be a nuisance and the owner of the same liable to an adjoining owner though the latter acquired his property after the kiln was established.[120] And where land, on which was a kiln for drying lumber, was leased to a party with knowledge by the owner that the kiln would be used for such purpose and would be a source of danger to adjoining property of the plaintiff, it was decided that the lessor was liable to the plaintiff for the injuries occasioned thereby.[121]

§ 112. **Coke ovens.**— The maintenance of coke ovens, though a lawful trade, or business, may be restrained as a nuisance where it is located so near to a dwelling house as to cause annoyances

116. Smiths v. McConathy, 11 Mo. 517. See, as to smells, §§ 157-173, herein.

117. O'Reilly v. Perkins, 22 R. I. 364, 48 Atl. 6.

118. Kirchgraber v. Lloyd, 59 Mo. App. 59; State ex rel. Horskottle v. St. Louis Board of Health, 16 Mo. App. 80. See, also, as to brick kilns § 145, herein.

119. Fuselier v. Spalding, 2 La. Ann. 773; Kirchgraber v. Lloyd, 59 Mo. App. 59; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567, affirming 2 Thomp. &c., 231; Walter v. Selfe, 4 DeG. & S. 315, 20 L. J. Ch. 433, 15 Jur. 416; Roberts v. Clarke, 18 L. T. 49. Compare Huckenstine's Appeal, 70 Pa. St. 102, 10 Am. Rep. 669; Hole v. Barlow, 4 C. B. N. S. 334, 4 Jur. N. S. 1019, 27 L. J. C. P. 207, 6 W. R. 619. See, as to Smoke from Brick Kilns a nuisance, § 145, herein.

120. Gravel v. Gervais, M. L. R. 7 S. C. 326.

121. Helwig v. Jordan, 53 Ind. 21, 21 Am. Rep. 189.

which materially interfere with the ordinary physical comfort of human existence.[122] So, smoke, soot, cinders and gas which are emitted from a coke oven in the course of manufacturing coke, which cause sickness to one in a private residence and her family, which injure the shrubbery and make the home almost untenantable, constitute a private nuisance for which relief by injunction will be granted.[123] In a case, however, in Pennsylvania, where the plaintiff brought a suit to restrain the operation of certain coke ovens, it was decided that though, under the circumstances of the case and having in view the suitable location of such ovens, they would not be enjoined at equity, yet a person injured thereby was entitled to his damages at law.[124]

§ 113. **Cotton gin.**—The maintenance of a cotton gin so near a residence that the comfortable enjoyment thereof is interfered with by reason of the noise, dust and smoke therefrom, constitutes a nuisance which will be enjoined.[125] So, the employment, by the proprietor of a ginning plant, of machinery which separates dust and sand from cotton by means of a blast which drives the particles of dust and sand into the air, and causes them to be blown into the plaintiff's dwelling to his serious annoyance and injury, has been held an invasion of his right to enjoy his home for which the proprietor of the machinery is liable to an action for damages.[126] The court said in this case: "The plaintiff has a natural right to the enjoyment of the unpolluted air; and if the defendant corporation, by contaminating the air with dust, dirt and lint, thrown into the air by artificial means, and blown into her dwell-

122. Herbert v. Rainey, 54 Fed. 248.

123. McClung v. North Bend Coal & Coke Co., 9 Ohio C. C. 259, 31 Ohio L. J. 9. See, as to smoke, §§ 135-156, herein.

124. Robb v. Carnegie, 145 Pa. 324, 22 Atl. 649, 28 W. N. C. 339, 14 L. R. A. 329.

125. Faulkenburg v. Wells (Tex. Civ. App., 1902), 68 S. W. 327, holding that the owner, though not residing there, could maintain the action and that his right was not affected by the fact that he did not complain of the gin as a nuisance until about two years after it was erected, where it appeared that the owner did nothing to induce, and was not consulted as to, its erection or purchase. As to smoke see §§ 135-156, herein. As to noise see §§ 174-191, herein.

126. Pouder v. Quitman Ginnery (Ga., 1905), 492 S. E. 746.

ing, to her hurt and discomfort, has interfered with her enjoyment of the premises, the defendant must respond to her in damages."[127] And a license from the municipal authorities to maintain a steam cotton press though entitled to high consideration upon the question of whether it constitutes a nuisance is not conclusive, for a license may be abused or the annoyance so great that they cannot be legalized.[128] In an action however by one to restrain the erection of a cotton gin an injunction will not be granted where it does not clearly appear that it is not reasonably possible to carry on the business in such a manner as not to create a nuisance, for equity will not interfere to restrain that which is not a nuisance, *per se,* but may become so by reason of circumstances, such a result being uncertain, contingent, or indefinite.[129] In an action by one for a private nuisance caused by the erection and operation of a steam cotton press it has been held sufficient to allege increased danger from fire and liability of boilers to explode, thereby rendering the plaintiff's dwelling unfit for habitation and impairing the value of his property though neither an actual explosion or fire are alleged.[130]

§ 114. **Electric light or power plant.**— Where one seeks to restrain the construction and operation of an electric power house on the ground that it will be a nuisance when completed and in operation, the injunction is properly refused where the evidence is conflicting upon the question of whether the plaintiff will sustain any actual injury.[131] And in an action by one residing in a manufacturing district to restrain an alleged nuisance caused by the operation of an electric light plant on the adjoining premises it was decided that, the evidence being conflicting as to the cause and extent of annoyance complained of, and it appearing that no other location was available and that the defendant used the best machinery and was guilty of no negligence, the operation of the plant would not be enjoined as a nuisance since it would

127. Per Evans, J.

128. Ryan v. Copes, 11 Rich. L. (S. C.) 217, 73 Am. Dec. 106.

129. Rouse v. Martin, 75 Ala. 510, 51 Am. Rep. 463.

130. Ryan v. Copes, 11 Rich. L. (S. C.) 73 Am. Dec. 106.

131. Powell v. Macon & I. S. R. Co., 92 Ga. 209, 17 S. E. 1027.

only afford slight relief to the plaintiff and would cause serious injury to both the defendant and the public and the plaintiff should therefore be left to his remedy at law.[132]

§ 115. **Exhibitions and Playhouses.**—It is declared in an early work that playhouses are not nuisances in their own nature "but may only become such by accident as where they draw together great numbers of coaches or people as prove generally inconvenient to the places adjacent, or where they pervert their original institution, by recommending vicious and loose characters under beautiful colors to the imitation of the people, and make a jest of things commendable, serious, and useful."[133] But in an English case in which the question arose as to the right of a party to an injunction against an exhibition company for an alleged nuisance consisting of the assembling of a large number of cabs to take persons home from the exhibition, the court refused to grant an injunction, it appearing that the cabs were assembled under the direction of the police authorities and the court held that the nuisance was attributable not to the defendants but to the action of the police authorities.[134] Where, however, a public show in the nature of a circus was established on land which had been dedicated to a town for the purpose of a graveyard and which was used as such, it was decided that it constituted a public nuisance.[135]

§ 116. **Fat and bone boiling establishment.**—A fat or bone boiling establishment is a nuisance where it infects the air with noisome smells and gases injurious to health.[136] To justify the

132. Riedeman v. Mt. Morris Electric Light Co., 56 App Div. (N. Y.) 23, 67 N. Y. Supp. 391.

133. Bacon's Abr. (7 Wilson's Ed. 1854) 224.

134. Germaine v. The London Exhibitions, Limited, 75 Law T. R. 101. Compare Barbee v. Penley, L. R. (1893) 2 Ch. 447, holding that where crowds assemble in a street in front of a theatre before the doors open so that access to and egress from the abutting property is prevented, a nuisance to the owner of such property is created.

135. Kansas City v. Lemen, 57 Fed. 905, 6 C. C. A. 627.

136. Cropsey v. Murphy, 1 Hilt. (N. Y.) 126. See, also, Millhiser v. Willard, 96 Iowa, 327, 65 N. W. 325; Grand Rapids v. Weiden, 97 Mich. 82, 56 N. W. 923; North Brunswick Township Board v. Lederer, 52 N. J. Eq. 675; Meigs v. Lister, 23 N. J. Eq. 199; Smith v. Cummings, 2 Pars. Eq. Cas. (Pa.) 92. See Canal Melt-

granting of an injunction the injury complained of must be a substantial one.[137] Where noxious smells and gases from such an establishment cause a depreciation in the value of adjoining property, an action therefor will be against the proprietor of the establishment.[138] So, where the boiling of putrid animal matter caused offensive smells, which injured the rental value of plaintiff's property and made the premises nearly unfit for habitation, it was decided that a nuisance was thereby created and that the injury was one for which a remedy would be granted.[139] The fact that the odors are not unwholesome is not a sufficient reason of itself for refusing an injunction.[140] Nor is the fact that the establishment is used for the purpose of disposing of the refuse matter of a city, and as such is essential to its welfare. So, in an action to restrain such an establishment in New Jersey it was decided that the injunction would be granted, though it appeared that the establishment was used for the purpose of disposing of refuse matter from the city of New York.[141] But the fact that a rendering establishment is maintained in a city in violation of a penal statute is not a sufficient ground for enjoining its maintenance where it does not appear that it constitutes an actionable nuisance.[142] The bill, in an action to obtain an injunction against a business of this kind, should specially state the injury complained of and contain a special prayer for the relief desired.[143] In a suit to enjoin the carrying on of such a business the record of a conviction on an indictment for a nuisance in respect to that business is *prima facie* evidence on behalf of the plaintiff.[144]

ing Co. v. Columbia Park Co., 99 Ill. App. 215.

137. Tiede v. Schmeidt, 105 Wis. 470, 81 N. W. 826; Pennoyer v. Allen, 56 Wis. 510. As to smells see §§ 157-173, herein.

138. Ruckman v. Green, 9 Hun (N. Y.) 225.

139. Francis v. Schoellkopf, 53 N. Y. 152.

140. Meigs v. Lister, 23 N. J. Eq. 199. That smells need not be injurious to health to be a nuisance see § 138, herein.

141. Meigs v. Lister, 23 N. J. Eq. 199.

142. Tiede v. Schmeidt, 99 Wis. 201, 74 N. W. 798.

143. Smith v. Cummings, 2 Pars. Eq. Cas. (Pa.) 92.

144. Peck v. Elder, 5 N. Y. Super. Ct. 126.

§ 117. **Ferries.**—Where one has a right by prescription to maintain a ferry and another erects a ferry so near it as to draw away its custom, it has been held a nuisance for which the injured party has his action.[145] And the same rule has been held to apply to an exclusive privilege created by statute to maintain a ferry or bridge, in which case the erection of another bridge so near it as to create competition to the franchise was declared a nuisance and an injunction was granted preventing the carrying on of the business in competition with the statutory franchise, and protecting such franchise.[146]

§ 118. **Fertilizer factories.**—A nuisance *per se* has been held to exist in the case of the maintenance, in a populous neighborhood, of an establishment for the manufacture of fertilizer from fish.[147] And it has been decided that the manufacture of a fertilizer from the carcasses of dead animals and from other refuse may be perpetually enjoined where it is conducted in a populous farming district, and depreciates the value of property and affects those residing in the neighborhood with nausea and vomiting.[148] In a case in Maryland, which was an action for a nuisance by the operation of a fertilizer factory from which it was alleged that noxious gases escaped, causing great physical discomfort to the plaintiff and his tenants, and also material injury to the property, it was said by the court: "No principle is better settled than that where a trade or business is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property, or which occasions material injury to the property itself, a wrong is done to the neighboring owner, for which an action will lie. And this, too, without regard to the locality where such business is carried on; and this, too, although the business may be a lawful business, and one useful to the public, and although the best and most approved appliances and methods may be used in

145. Ogden v. Gibbons, 4 Johns. Ch. (N. Y.) 150, 160. As to prescriptive right see §§ 50-58, herein.

146. Newburgh, &c., T. R. Co. v. Miller, 5 Johns. Ch. (N. Y.) 101, 9 Am. Dec. 214.

147. State v. Luce, 9 Houst. (Del.) 396, 32 Atl. 1076.

148. Evans v. Reading Chemical F. Co., 160 Pa. 209, 28 Atl. 702.

the conduct and management of the business. . . . We cannot agree with the appellant that the court ought to have directed the jury to find whether the place where this factory was located was a convenient and proper place for the carrying on of the appellant's business, and whether such a use of his property was a reasonable use, and if they should so find the verdict must be for the defendant. It may be convenient to the defendant, and it may be convenient to the public, but in the eye of the law, no place can be convenient for the carrying on of a business which is a nuisance, and which causes substantial injury to the property of another. Nor can any use of one's own land be said to be a reasonable use which deprives an adjoining owner of the lawful use and enjoyment of his property."[149] And it has been decided that a party will not be deprived of his right to an injunction restraining the carrying on of a fertilizer business by acts on his part or conversations between him and the defendant which in no way influenced the latter in the erection or conduct of the establishment.[150] Where, however, the evidence is conflicting, and leaves the question in doubt as to whether such a factory constitutes a nuisance and the complainant has resided for years in the same place with knowledge of improvements by defendants, and has made no objection to the establishment, and it appears that the injury to the complainant is slight, if any, and that the defendant has a large capital invested in his business, which will be ruined if the injunction asked for is granted, the court will refuse to grant it.[151] So, in a

149. Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 276, 20 Atl. 900, 25 Am. St. R. 595, 9 L. R. A. 737, per Robinson, J.

150. Barkan v. Knecht, 10 Wkly. Law Bul. (Ohio) 342.

151. Tuttle v. Church, 53 Fed. 422. The court said in this case: "It is true that a court of equity has the power to grant an injunction before a trial at law, to prevent irreparable injury, multiplicity of suits, or vexatious litigation, where the court has no doubt as to the right of the plaintiff, but where the right is doubtful and has not been established at law, this form of relief will be withheld. In other words, the question of nuisance or no nuisance must, where the evidence is conflicting and a doubt exists, be first tried by a jury. . . . Again, no relief will be granted in equity where a party has been guilty of great *laches*, but he will be left to pursue his remedy at law. Where relief is sought against a nuisance, due diligence must be used in the assertion of rights which are claimed, and equity will not interfere when a party has

proceeding to obtain an injunction against the carrying on of such a business, on the ground that on account of the noxious odors the complainant was compelled to keep the doors and windows of his dwelling closed, and that it injured his crops and trees, it was decided that the preliminary injunction would not be granted, it appearing that the loss to fruit and crops for the season had been already sustained, that the discomfort and annoyance had been submitted to for several years, that it would be a hardship to defendant to stop his business at the time, and that the danger of future loss was not so imminent that complainant would suffer irreparable injury by allowing the case to proceed to final decree on the bill, answer and proof.[152]

§ 119. **Foundries.**—A brass foundry and machinery incident thereto are not *prima facie* nuisances, and a plaintiff who complains of them must allege and prove that they are such by reason of their peculiar location or the improper and negligent manner in which they are conducted. If injurious effects complained of may be prevented without abating or enjoining the works or operation thereof entirely, only the causes of the specific injurious results should be enjoined.[153] And a proposed foundry not being a nuisance *per se* it has been decided that it will not be enjoined before it has been shown to be a nuisance in an action at law.[154]

allowed the defendant to continue in the erection of his obnoxious structure at great expense and without complaint. . . . A delay of three years or more has been ordinarily held to be such *laches* as will preclude a party from this form of relief. . . . A motion for an injunction is addressed to the sound discretion of the court, guided by certain established rules. This means that the court is to consider all the circumstances of each case before it will exercise this extraordinary remedy. Among the considerations which should influence a chancellor is the relative effect upon the parties of the granting or refusing the injunction. . . . Where the right at law is doubtful, the case resolves itself into a question of comparative injury,—whether the defendants will be more injured by the injunction being granted, or the plaintiff by its being withheld." Per Colt, C. J.

152. Sellers v. Parvis and Williams Co., 30 Fed. 164.

153. McMenomy v. Band, 87 Cal. 134, 26 Pac. 795. As to relief where nuisance can be avoided see § 90, herein.

154. Finegan v. Allen, 46 Ill. App. 553.

§ 120. **Gas works.**— Where gas works cause a special injury to another they constitute a nuisance for which an action may be maintained by the one injured.[155] So where a person's wells are polluted by the percolation of refuse from gas works maintained on adjoining premises, an action for damages will lie for such injury.[156] And a gas company cannot escape liability for injuries caused by the operation of its works by the fact that it has a charter from the State to carry on the business, or that it uses improved appliances so as to cause as little inconvenience as possible, or that it exercises a high degree of care.[157] The possibility of an injury from the explosion of gas works is not, however, a sufficient ground for the granting of an injunction restraining their erection, where the chances of an explosion are slight and the premises of the complainant are located at such a distance that, if one should occur, they would not be seriously endangered.[158]

§ 121.—**Ice house.**—The use of a building for the storage of ice may constitute a nuisance, as where it was maintained so near to the dwelling of another that the dampness therefrom struck through the walls of the dwelling, injured the structure, and made it so unsafe and unfit for habitation as to diminish its rental value, in which case it was held that damages were not recoverable for a permanent depreciation in value of the dwelling, but for depreciation in rental value to time of trial and for the cost of repairing plaintiff's house and putting it in a condition to prevent future injury.[159]

§ 122. **Laundry.**—A steam laundry is not a nuisance *per se*, and it will not be restrained as a nuisance because of a slight noise or vibration affecting other occupants of a building, where they are neither injured nor interfered with in their business, nor sus-

155. Carhart v. Auburn Gaslight Co., 22 Barb. (N. Y.) 297.

156. Pensacola Gas Co. v. Pebley, 25 Fla. 381, 5 So. 393.

157. Rosenheimer v. Standard Gaslight Co., 36 App. Div. (N. Y.) 1, 55 N. Y. Supp. 192. Where authorized by statute, see §§ 67-77, herein.

158. Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201.

159. Barrick v. Schifferdecker, 123 N. Y. 52, 25 N. E. 365, 33 N. Y. St. R. 485.

tain any injury to their health or that of their employees.[160] But where a Chinese laundry, in the basement of a building, injured the business of the occupant of the floor above it was decided that an injunction would be granted restraining the carrying on of the laundry in such a manner as to cause the injury complained of, the effect of the injunction being to allow the defendants to carry on their business at the place occupied by them if they could so alter and change their mode of conducting it as not to annoy and injure the plaintiff.[161]

§ 123. **Merry-go-round.**—The running of a merry-go-round may or may not constitute a nuisance, dependent upon the place, the time, the circumstances, the manner in which it is conducted, and the effects produced. If it materially interferes with a person of ordinary sensibility in his ordinary physical comfort it will, dependent upon the surroundings, constitute a nuisance which may be enjoined. So it has been decided that a town council may abate as a nuisance a merry-go-round run by steam, and which is accompanied by a band and the blowing of a whistle at frequent intervals, where it is maintained in a neighborhood surrounded by dwellings and is run until ten and half-past ten at night.[162]

§ 124. **Quarries.**—Unless a party can show a right, either in the nature of a presumed grant or easement or in some other mode, to use his property in a particular way, such as for the working of quarries, he cannot so use it if it occasions injury to his neighbors in the quiet enjoyment of their legal rights and privileges. And it is no defense to an action for an injury therefrom that he used proper precautions to prevent the injuries complained of.[163] So in an action against the lessee of a stone quarry by one dwelling near it, an injunction was granted restraining the defendant from so operating the quarry that pieces of rock were

160. Miller v. Schindle, 15 Pa. Co. Ct. R. 341.

161. Warwick v. Wah Lee & Co., 10 Phila. (Pa.) 160.

162. Davis v. Davis, 40 W. Va. 464, 21 S. E. 906.

163. Scott v. Bay, 3 Md. 431. See §§ 89, 92, 94, herein.

constantly thrown into the public road and upon the plaintiff's premises to the great danger of the plaintiff and his family.[164]

§ 125. **Shooting gallery.**—A shooting gallery erected in a proper place and conducted in a proper manner is not a public nuisance and is to be considered as a lawful business, in such a case, in the absence of a statute declaring it a nuiance.[165]

§ 126. **Slaughter house—Prima facie a nuisance.**—Slaughter houses have been declared to be within the class recognized by the law as in their nature nuisances.[166] They were originally regarded when located in a city or town as nuisances *per se*,[167] and have been held to be such in somewhat recent cases.[168] According to the weight of authority, however, slaughter houses are now regarded as *prima facie* nuisances.[169] And a slaughter house being only

164. Saven v. Johnson, 4 Pa. Co. Ct. R. 360, 3 Del. Co. R. 323.

165. Hubbell v. Viroqua, 67 Wis. 343.

166. Harmison v. Lewiston, 46 Ill. App. 164.

167. Pumer v. Pendleton, 75 Va. 516, 40 Am. Rep. 738.

168. Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378; Attorney-General v. Steward, 20 N. J. Eq. 415; Commonwealth v. Wescott, 4 Pa. C. P. 58.

169. Reichert v. Geers, 98 Ind. 73, 49 Am. Rep. 736; Bushnell v. Robeson, 62 Iowa, 540, 17 N. W. 888; Seifried v. Hays, 81 Ky. 377, 381, 50 Am. Rep. 167; Woodyear v. Schaefer, 57 Md. 1, 40 Am. Rep. 419; Brady v. Weeks, 3 Barb. (N. Y.) 157; Catlin v. Valentine, 9 Paige Ch. (N. Y.) 575, 38 Am. Dec. 567; Peck v. Elder, 5 N. Y. Super. Ct. 126; Dubois v. Budlong, 15 App. Prac. (N. Y.) 445; Pumer v. Pendleton, 75 Va. 516, 40 Am. Rep. 738, holding, also, that when a slaughter-house is complained of the burden is on the one maintaining it to show that it is not a nuisance.

"Butchering cattle is a legitimate business, and must necessarily be carried on in the vicinity of each city or town, the inhabitants of which need to be supplied with meat. And, consequently, a pen in which to keep the live cattle, and a house in which to slaughter them is not *per se* a public or private nuisance, unless established so near the center of population or to a private dwelling place as to necessarily and unavoidably hurt and annoy the public, or invade and do damage to the private vested right of an individual. But when such an establishment is located a reasonable distance from the center of population and from the dwelling places of individuals, it can be regarded and treated as a nuisance, public or private, as the case may be, only when the business is conducted in such negligent or reckless manner as to become offensive or hurtful to the public and individuals." Beck-

prima facie a nuisance it may be shown that it can be so conducted and carried on, even in a densely populated part of a city, as not to endanger or affect the health or interfere with the comfort of the neighboring inhabitants; and when this is shown the presumption is removed and the business is not a nuisance.[170]

§ 127. **Slaughter house—Nuisance by location or operation.**—A slaughter house may become a nuisance by the manner in which it is conducted.[171] So it may be a nuisance if ill managed or neglected, though it may be in no sense in the compact part of a town.[172] And a slaughter house which, by reason of its location, or the manner in which it is conducted, affects a person's health, or renders his enjoyment of life physically uncomfortable, or materially injures his property, will constitute a nuisance which may be enjoined.[173] And individuals suffering special injuries from such a nuisance may unite in asking for an injunction though they separately own premises on which they reside and which are affected.[174] If the nuisance complained of is liable to produce irreparable injury before a trial at law can be had the business may be enjoined before it has been established a nuisance at law.[175] The court will not, however, enjoin the operation of a slaughter house where it appears that it can be so conducted as not to be a nuisance, and upon proof of such fact the business should be allowed to continue, and the court should, by its decree, determine the conditions on which it may be conducted.[176] And the erection

ham v. Brown, 19 Ky. Law R. 519, 520, 40 S. W. 684, per Lewis, C. J.

170. Dubois v. Budlong, 15 Abb. Prac. (N. Y.) 445.

171. Cooper v. Schultz, 32 How. Prac. (N. Y.) 107, 135.

172. State v. Wilson, 43 N. H. 415, 82 Am. Dec. 163.

173. Babcock v. New Jersey Stockyard Co., 20 N. J. Eq. 296; Attorney-General v. Steward, 20 N. J. Eq. 415; Pumer v. Pendleton, 75 Va. 516, 40 Am. Rep. 738. A slaughter house within a city is an unwholesome business or establishment, and no argument is necessary to establish this fact. Huesing v. Rock Island, 128 Ill. 465, 475, 21 N. E. 558, 15 Am. St. R. 129.

174. Bushnell v. Robeson, 62 Iowa, 540, 17 N. W. 888; Brady v. Weeks, 3 Barb. (N. Y.) 157.

175. Minke v. Hofeman, 87 Ill. 450, 29 Am. Rep. 63.

176. Bushnell v. Robeson, 62 Iowa, 540, 17 N. W. 888. See, also, Minke v. Hofeman, 87 Ill. 450, 29 Am. Rep. 63.

of a slaughter house and abattoir will not be enjoined where it appears that the latest and most approved appliances are to be used and it is not shown that the proposed business will be a nuisance.[177] Nor will such a business be enjoined merely because it depreciates the value of property in the neighborhood, as one who sustains an injury of this character has a sufficient remedy at law.[178] In an action by one who claims to have been injured in the use and enjoyment of his dwelling by the smells which arise from a slaughter house, evidence of the fact that one who lives at a greater distance from such slaughter house than the plaintiff has been annoyed in the enjoyment of his dwelling by the same cause is admissible for the purpose of showing the existence of the nuisance complained of.[179]

§ 128. Where slaughter house originally remote from habitation—Subsequent development of locality.—The fact that a slaughter house was originally located remote from habitations is no defense where it subsequently becomes a nuisance by reason of the development of such locality by the laying out of roads and the erection of buildings and dwellings.[180] And a person is not protected from indictment and conviction for a nuisance consisting of a slaughter house maintained by him, by the fact that at the time he erected such nuisance other human habitations were so far removed from it as not to be annoyed or disturbed thereby.[181] So it was said in Brady v. Weeks:[182] "When the slaughter house was erected, it was remote from the thickly settled parts of the city; but it seems that the city has now grown up to it, and that the necessities of the population require the occupation of the lots in the immediate vicinity of the slaughter house

177. Sellers v. Pennsylvania R. Co., 10 Phila. (Pa.) 319. See, also, Attorney-General v. Steward, 20 N. J. Eq. 415.

178. Ballentine v. Webb, 84 Mich. 38, 47 N. W. 485.

179. Fay v. Whitman, 100 Mass. 76.

180. Commonwealth v. Upton, 6 Gray (Mass.), 473; Brady v. Weeks, 3 Barb. (N. Y.) 157; Smith v. Cummings, 2 Pars. Eq. Cas. (S. C.) 92. Compare Ballentine v. Webb, 84 Mich. 38, 47 N. W. 485.

181. Taylor v. People, 6 Parker's Cr. R. (N. Y.) 347.

182. 3 Barb. (N. Y.) 157.

for dwelllings. When the slaughter house was erected it incommoded no one; but now it interferes with the enjoyment of life and property, and tends to deprive the plaintiffs of the use and benefit of their dwellings. There can be no real necessity for conducting such an offensive business as slaughtering cattle in this part of the city, which is now occupied by valuable and costly buildings. As the city extends such nuisances should be removed to the vacant ground beyond the immediate neighborhood of the residences of the citizens. This, public policy, as well as the health and comfort of the population of the city, demand." [183] But in an early English case, where a person had been indicted for maintaining a public nuisance consisting of a slaughter house, it was said by the court: "If a certain noxious trade is already established in a place remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near to it that the carrying on of the trade becomes a nuisance to the persons using the road, in those cases the party would be entitled to continue his trade, because his trade was legal before the erection of the houses in the one case, and the making of the road in the other." [184]

§ 129. **Slaughter house a nuisance—Health need not be endangered.**—It is not necessary to render a slaughter house a nuisance that it should endanger the health of the neighborhood, it being sufficient if it produces that which is offensive to the senses and which renders the enjoyment of life and property uncomfortable.[185]

§ 130. **Slaughter house a nuisance—Defense to indictment for.**—On a prosecution for maintaining a slaughter house which is alleged to be a public nuisance it is no defense that the smells therefrom are blended with other similar smells from nuisances

183. Per Paige, J.

184. Rex v. Cross, 2 Car. & P. 484, per Abbott, C. J.

185. Catlin v. Valentine, 9 Paige's Ch. (N. Y.) 575, 38 Am. Dec. 567. See § 87, herein.

of a like character.[186] And it is no defense to a prosecution for maintaining a nuisance, consisting of a slaughter house that it is kept in as good order and as cleanly as such houses can be kept, for the best conducted slaughter house may be a public nuisance if in the wrong place.[187]

§ 131. **Slaughter house—Defense to action to enjoin.**—It is no defense to an action to enjoin the maintenance of a slaughter house on the ground that it constitutes a public nuisance, that there are other slaughter houses in the neighborhood similar to that complained of, against which no proceedings have been taken.[188] And the fact that one has been indicted, tried and acquitted for maintaining such a nuisance, will not deprive a court of jurisdiction in an action to enjoin the carrying on of such a business so as to constitute a private nuisance near the person's dwelling.[189]

§ 132. **Smelting works.**— The operation of works for smelting lead may be enjoined when they are so located as to emit noxious and poisonous gases, fumes and vapors, causing offense and injury to residents on an adjoining farm and poisoning and destroying soil and vegetation to the injury of animals on the farm.[190] And where the fumes and smoke from the operation of a smelter destroyed vegetation upon the premises of another it was held to constitute a nuisance for which damages were recoverable.[191]

§ 133. **Steel furnaces.**—In a recent case in Pennsylvania an action was brought to restrain a steel company located in Pittsburg from so operating its blast furnaces as to permit the escape therefrom of dust in such a quantity as to injure the houses of the plaintiff. It appeared that the houses, though in a residential sec-

186. Dennis v. State, 91 Ind. 291.

187. Moses v. The State, 58 Ind. 185, 187.

188. Woodyear v. Schaefer, 57 Md. 1, 40 Am. Rep. 419.

189. Minke v. Hofeman, 87 Ill. 450, 29 Am. Rep. 63.

190. Appeal of Pennsylvania Lead Co., 96 Pa. 116, 42 Am. Rep. 534.

191. Stenett v. Northport Min. & Sm. Co., 30 Wash. 164, 70 Pac. 266.

tion, were located near a manufacturing district and within reach of the dust and smoke from the plants. The plaintiff had submitted for a number of years to the general discomforts and annoyances without complaint, and were willing to continue to submit to them in common with other citizens. The defendant, however, had some time prior to this action torn down three furnaces and erected four new ones of immense size and several times the capacity of the old. It was claimed by the plaintiff that, in using fine Mesaba ore dust, without so operating the furnaces as to prevent the escape of dust from "slips," causing admitted devastation, there was a practical confiscation of their properties, and this action was brought to protect them in the enjoyment of their private property subject to the general conditions of the city in which they lived. The facts were not in dispute and no finding of fact was assigned as error by the defendants. It was decided by the court that the plaintiff was entitled to an injunction restraining the defendants from so operating its furnaces as to cause to be emitted therefrom clouds of ore dust, working and causing the injury to the property of the plaintiff, as in the bill described and found by the court below.[192] The following quotation from the court is of value in this connection: "If this bill were for relief from personal inconvenience and interference with the appellant's free and full enjoyment of their property, due merely to the conditions of smoke and dust that have existed for years, and will exist as long as the city itself continues to be the great steel and iron manufacturing center, it would be promptly dismissed. Or the smoke and dust now coming from all the other surrounding mills and furnaces no complaint is made, and of what used to come from the old furnaces of the appellee the appellants made no complaint, and would not be complaining now but for the changed conditions brought about by the appellee. The court below, though requested by it, refused to find that 'the matters complained of by the plaintiffs are only such discomforts and in-

192. Sullivan v. Jones & Laughlin Steel Co. (Pa., 1904), 57 Atl. 1065, three judges dissenting.

conveniences as always are and have been incident to and consequent upon close proximity to an exclusively manufacturing section of a manufacturing city.' The changed conditions brought about by the appellee have not resulted from development and natural use and enjoyment of its own property, as was the situation in Pennsylvania Coal Co. v. Sanderson,[193] the doctrine of which case has never been and never ought to be extended beyond the limitations put upon it by its own facts. There it was said of the coal company: 'They have brought nothing on to the land artificially. The water as it is poured into Meadow Brook is the water which the mine naturally discharges; its impurity arises from natural, not artificial causes. The mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it.' Here the furnaces were artificially brought by appellee onto its lands by being built there by it, and the Mesaba ore converted by the furnaces into iron is also artificially brought there by it. It knew when about to erect these new furnaces of immense size and great capacity, that in their operation the rights of others, among them those of the appellants, to the use and enjoyment of their property, situated in what, for years, had been a portion of the city given up to residences, were not to be utterly disregarded; and when it began to use the fine ore dust which has manifestly caused the serious injury to the property of the appellants, it was again bound to consider the effect of the use of this ore upon the nearby residences. By this we are not to be understood as saying, or even intimating, that the large furnaces could not be erected and operated, that Mesaba ore cannot be used, or that if, in the operation of the furnaces, and the use of the fine ore, the discomfort and annoyance of the appellants had simply been increased in degree, they would be entitled to equitable relief. When, however, as the result of the improvements voluntarily made by the appellee, and its use of a new ore, the annoyance, inconvenience and injury to which the appellants are now

193. 113 Pa. 126, 6 Atl. 453, 57 Am. Rep. 445.

subjected, do not differ merely in degree from those to which they formerly submitted as part of their lot as citizens of the 'Iron City,' but in kind, and practical destruction and confiscation of their properties confront them, a very different situation is presented to a chancellor from those cases in which the rule is laid down that people who live in such a city or within its sphere of usefulness do so of choice, and therefore voluntarily submit themselves to its peculiarities and its discomforts. That very rule, as announced in Huckenstine's appeal,[194] recognizes their right to live and have their homes there; and a case cannot be found as authority for the right of any manufacturing company, located in a manufacturing district of a city, to so rebuild and operate its furnaces as to actually destroy homes and other property in a residential portion of the same city. That this is what the appellee is doing with the properties of the appellants is an irresistible conclusion, and the only relief is by injunction. If it is to be permitted to so operate its furnaces that the burning and corroding ore dust emitted from their stacks is borne by the winds and scattered over the properties of the appellants with destroying effect, simply because of the plea that it cannot be helped, for the same reason it might ask a chancellor to stay his arm from arresting the descent of showers of fire from the same stacks down on the same nearby homes."[195]

§ 134. **Undertakers.**—The business of an undertaker is not a nuisance *per se*. The proprietor of such a business, however, has no right to conduct it that the occupant of an adjoining dwelling is injured in his health or his home rendered uncomfortable either by noxious vapors or the germs and seeds of disease. But where such a business is complained of as a nuisance the burden of proof rests on the complainant to establish such fact, and it will not be adjudged to be a nuisance merely because it is obnoxious or offensive to an individual who is peculiarly sensitive

194. 70 Pa. 102, 10 Am. Rep. 669.
195. Per Brown, J.

and has an extraordinary repugnance to anything connected with death.[196]

196. Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490. The court considering the question at length said, in part: "But the further contention that the business itself is a nuisance is of great importance and cannot be passed by without the fullest consideration. The claim is, that it is impossible to carry on a business of this character without constant liability to communicate diseases to those who reside in the neighborhood, and that this liability creates dread, discomfort and apprehension, which abridges the rights of property. It is insisted that the deadly spore will, in spite of the utmost precaution, be carried in such vessels, and are liable to be dislodged, and to be communicated to the nearest inhabitant at any moment, impregnating him with the seeds of death. In the first place admitting the possibility of danger lurking in every box where the person buried therefrom has died of a contagious disease, what is the duty of the court? Should the court say that such business, however lawful, cannot be carried on in the populous part of a city? I am not prepared to assent to that doctrine. It is quite clear to my mind that this, like many other occupations, may be so conducted as to be a nuisance. For example, a grocer might allow his vegetables to decay in such quantities and in such localities upon his premises as to do infinite harm to his neighbor, and subject him to the penalties of the law, or to the restraint of a court of equity. The same may be said of the vendor of meats; so negligent might he be as to scatter disease and death to multitudes. But because these things are possible, or may occasionally happen, it is not pretended for a moment that it is unlawful to carry on the grocery business, or to vend meats in the populous parts of our cities. It seems to me that the same reasoning may be applied, with great certainty, to the business of undertaking. It may be carried on so negligently, with such indifferent regard to the rights and feelings of others, as to be not only an offense to the tender sensibilities of the intelligent and refined, but to be a direct menace to the health, and open violation of the civil rights of all residing in the neighborhood. . . . The law means to protect everyone in the enjoyment of such rights; in the enjoyment of his health as well as in the enjoyment of his property, on the one hand, and, on the other, in the enjoyment of his legitimate vocation, as well as in the possession of his property. . . . Is the business in which defendant is engaged a lawful one? To a certain extent that is not disputed. Has he a right to carry it on on the premises which he owns and occupies? He certainly has unless it unreasonably interferes with the lawful rights of another. . . . In the second place, it is urged that the business of an undertaker is a nuisance *per se*. Is this proposition maintainable? . . . Is this business so detestable in itself as unreasonably to interfere with the civil rights or property rights of those who dwell within ordinary limits,

CHAPTER VIII.

Smoke, Fumes and Gases.

Section 135. Smoke as a nuisance.—Generally.
136. Right of individual to pure air.
137. Elements essential to render smoke a nuisance.
138. Need not be injurious to health.
139. Need be no special damage or pecuniary loss.
140. Locality as an element to be considered.
141. No distinction made as to classes of persons.
142. That others contribute to nuisance no defense.
143. What constitutes a nuisance by emitting smoke.—Particular instances.
144. Same subject.—Blacksmith's shop.
145. Same subject.—Brick and lime kilns.
146. When party not entitled to relief.
147. Where business legalized.
148. Action for removal of smokestack.
149. Constitutionality of legislative act making smoke a nuisance.
150. Power of municipality to regulate emission of smoke.
151. Same subject.—Words "dense smoke" construed.
152. Ordinance limiting emission of smoke from a chimney to "three minutes in any hour" construed.
153. Ordinance regulating smoke from tug-boats.—Not violation of commerce clause of constitution.
154. Municipal ordinances as to smoking in street cars.
155. Sufficiency of notice to abate.—English public health act.
156. Damages recoverable.

§ 135. **Smoke as a nuisance generally.**—Smoke alone was not a nuisance at commont law.[1] It, however, becomes a nuisance

and who can and do, without effort, see and hear what is being done? The inquiry is not whether it is obnoxious to this or that individual or not, but whether or not it is of such a character as to be obnoxious to mankind generally, similarly situated. . . . The law does not contemplate rules for the protection of every individual wish, or desire, or taste. It is not within the judicial scheme to make things pleasant or agreeable for all the citizens of the State." Per Bird, V. C.

1. St. Louis v. Hertzeberg Packing & P. Co., 141 Mo. 375, 42 S. W. 954,

where it is of such a character as to cause substantial discomfort or inconvenience to another, or to materially diminish the value of adjoining property.[2] No matter how lawful a business may be it cannot be conducted in such a manner as to directly, palpably and substantially injure and damage the property of others unless one can plant himself on some peculiar ground of grant, covenant, license or privilege which ought to prevail against a complainant, or on some prescriptive right,[3] and in an action for a nuisance of this character a defense is held to be demurrable which alleges that the business was conducted in the best and most approved manner, or that it is of great benefit, convenience and utility to the public.[4] So in an action for damages for a nuisance caused by smoke, gases and fumes emitted from the defendant's premises and carried on the plaintiff's to the discomfort and annoyance of himself and family, it is not necessary for the plaintiff to show that the business of the defendant was carried on recklessly or was not properly managed.[5] And a nuisance arising from smoke may be the subject of an action for substantial damages in an action at law; and wherever a jury would give substantial damages in such an action an injunction will be granted to restrain the continuance of the same.[6] So where the nuisance, consisting of smoke, soot, dust and noise from the operation of iron works,

39 L. R. A. 551, 64 Am. St. R. 516. See St. Paul v. Gilfillan, 36 Minn. 298, holding smoke is not a nuisance *per se*.

2. Whitney v. Bartholomew, 21 Conn. 213; Over v. Dehne (Ind. App. 1905), 75 N. E. 664; Norcross v. Thoms, 51 Me. 503, 81 Am. Dec. 588; Lursen v. Lloyd, 76 Md. 360; Wesson v. Washburn Iron Co., 13 Allen (Mass.), 95, 90 Am. Dec. 181; Whalen v. Keith, 35 Mo. 87; Hyatt v. Myers, 71 N. C. 271; Stockdale v. Rio Grande Western Ry. Co. (Utah, 1904), 77 Pac. 849; Sampson v. Smith, 8 Sim. 272; Rich v. Basterfield, 2 C. & K. 257; Gullick v. Tremlett, 20 W. R. 358.

3. Gilbert v. Showerman, 23 Mich. 448. See Friedman v. Columbia Machine Works, 99 App. Div. (N. Y.) 504, 91 N. Y. Supp. 129. As to prescriptive right see §§ 50-58, herein.

4. Friedman v. Columbia Machine Works, 99 App. Div. (N. Y.) 504, 91 N. Y. Supp. 129.

5. Fariver v. American Car & Foundry Co., 24 Pa. Super. Ct. 579. See, also, American Ice Co. v. Catskill Cement Co., 43 Misc. R. (N. Y.) 221, 88 N. Y. Supp. 455.

6. Crump v. Lambert, 17 L. T. (N. S.) 133. See Sampson v. Smith, 8 Sim. 272; Gullick v. Tremlett, 20 W. R. 358.

was a continuing one and the complaint was purely of an equitable nature, in which only equitable relief could be afforded, it was decided that the defense that the plaintiff had an adequate remedy at law was insufficient and that its insufficiency could be raised on demurrer.[7] So one permitting smoke to escape from his property so as to become a nuisance to occupants of adjoining property is liable to an action therefor.[8] So a person engaged in a manufacturing business in a well populated city may be restrained from so using his smokestack as that the soot issuing therefrom shall be a disturbance, annoyance and source of positive injury to another.[9] And in one case the court says in its opinion: "No case has been cited, and we think none can be found, sustaining the continuance of a business in the midst of a populous community, which constantly produces odors, smoke and soot of such a noxious character, and to such an extent that they produce headache, nausea, vomiting, and other pains and aches injurious to health, and taint the food of inhabitants."[10] Where certain injuries are claimed to be the result of the emission of smoke, complained of as a nuisance, testimony tending to show that others were annoyed and injured by smoke and cinders coming from the same source is held admissible to prove that the nuisance objected to was capable of inflicting the injury complained of.[11]

§ 136. **Right of individual to pure air.**—Every citizen has a right to pure air consistent with the nature of the community in which he lives.[12] He is entitled to have the air upon his premises untainted and unpolluted for the necessary and reasonable use of himself and family. This does not mean that it must be absolutely pure, but that it must not be rendered incompatible with the

7. Friedman v. Columbia Machine Works, 99 App. Div. (N. Y.) 504, 91 N. Y. Supp. 129.

8. Whalen v. Keith, 35 Mo. 87. See Ottawa Gaslight & Coke Co. v. Thompson, 39 Ill. 598.

9. Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. R. 51.

10. People v. White Lead Works, 82 Mich. 471, 479, 46 N. W. 735, 9 L. R. A. 722, per Grant, J.

11. Crane Co. v. Stammers, 83 Ill. App. 329.

12. Rhodes v. Dunbar, 57 Pa. St. 274, 286, 98 Am. Dec. 221; Fort Worth v. Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. R. 840.

physical comfort of human existence.[13] "It is certainly true that the owners and occupiers of dwelling houses, whether in the city or country, have the right to enjoy pure and wholesome air, that is, as pure and wholesome as their local situation can reasonably supply; and any act which materially corrupts or pollutes the air, done without authority or justification, is strictly a nuisance. If, therefore, a party should erect a manufacturing establishment in immediate proximity to the dwellings of his neighbors, and in the operation of which, large volumes of smoke, offensive odors and noxious vapors are emitted, whereby the comfort of the occupiers of the dwellings is materially interfered with, it would certainly present a case requiring the exercise of the restraining or preventive power of a court of chancery."[14] So in an English case it is said: "The owner of property has the right to have the air that passes over his land pure and unpolluted, and the soil and produce of it uninjured by the passage of gases, by the deposit of deleterious substances, or by the flow of water."[15]

§ 137. **Elements essential to render smoke a nuisance.**— Smoke is not a nuisance *per se*.[16] To constitue it a nuisance it must be such as to produce a tangible and appreciable injury to neighboring property, or such as to render it specially uncomfortable or inconvenient,[17] or to materially interfere with the ordinary comfort of human existence.[18] There must be an annoyance therefrom to a substantial degree.[19] The inconvenience must not be merely fanciful or one of mere delicacy or fastidiousness, but must be one which materially interferes with the ordinary comfort, physically, of human existence.[20] The law does not regard trifling inconveniences; everything must be looked at from a rea-

13. Cartwright v. Gray, 12 Grant Ch. (Ont.) 400; Walter v. Selfe, 4 DeG. & M. 321.

14. Adams v. Michael, 38 Md. 123, 126, 17 Am. Rep. 516, per Alvey, J.

15. Crump v. Lambert, L. R. 3 Eq. Cas. 409, 413, per Lord Romilly, M. R.

16. St. Paul v. Gilfillan, 36 Minn. 298.

17. Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567.

18. Crump v. Lambert, L. R. 3 Eq. Cas. 409, 413.

19. Carey v. Ledbitter, 13 C. B. (U. S.) 470.

20. Cartwright v. Gray, 12 Grant Ch. (Ont.) 400; Walter v. Selfe, 4 DeG. & M. 321.

sonable point of view, and in an action for nuisance caused by noxious and unwholesome smokes and smells the injury to be actionable must be such as to visibly diminish the value of the property and the comfort and enjoyment of it.[21] So an injunction restraining the use of soft coal in a steam heating plant adjacent to an ice pond on the ground that the ice was rendered unfit for use on account of the smoke and cinders therefrom, was refused, it appearing that the damage resulting from the smoke and cinders was trifling in comparison with that resulting from other causes, and that there was a considerable saving to the defendant by the use of such coal.[22] In this connection it is said by the court in a case in New Jersey: "The law takes care that lawful and useful business shall not be put a stop to on account of every trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or over-refined person. But, on the other hand, it does not allow anyone, whatever his circumstances or condition may be, to be driven from his home or to be compelled to live in it in positive discomfort, although caused by a lawful and useful business carried on in his vicinity. The maxim *sic utere tuo ut alienum non laedas,* expresses the well established doctrine of the law."[23] So it has been declared that to justify the interposition of a court of equity it should appear that the nuisance will cause irreparable injury to the property of the plaintiff, or that it will endanger his health, or prove a material injury to the comfort of his existence, or that it will greatly abridge the comfortable enjoyment of life and happiness.[24]

§ 138. **Need not be injurious to health.**—Smoke need not necessarily be injurious to health in order to render it a nuisance, but it may be one where it causes a substantial physical discomfort to another, that is, such a discomfort as does not depend upon the

21. Tipping v. St. Helens Smelting Co., 4 B. & S. 608. See Bamford v. Turnley, 3 B. & Ad. 66.

22. Downing v. Elliott, 182 Mass. 28, 64 N. E. 201.

23. Ross v. Butler, 19 N. J. Eq. 294, 298, 97 Am. Dec. 654, per The Chancellor.

24. Thebault v. Canova, 11 Fla. 143; Euler v. Sullivan, 75 Md. 616, 23 Atl. 845.

taste or imagination.[25] So smoke may be a nuisance where it makes a dwelling so uncomfortable as to drive away one not compelled by poverty to remain, though it does not injure the health of the occupants thereof.[26] So where it appeared that a sulphurous gas emitted from a factory was occasionally carried by the wind over adjoining premises, causing an irritation of the throats of those dwelling thereon, compelled the closing of windows, and injured vegetation, it was held to be no answer thereto that the fumes were not injurious to health.[27] So in England, under the Sanitary Health Act, 1866, sec. 19, it was decided that it was not necessary to show that the issuing of black smoke was injurious to health as well as a nuisance.[28] And to support an indictment for a nuisance it is not necessary that the smells produced by it should be injurious to health, it is sufficient if they be offensive to the senses.[29]

§ 139. **Need be no special damage or pecuniary loss.**—A person will be entitled to an injunction against the maintenance of a trade or occupation where the smoke and vapors therefrom are such as to produce material discomfort to the plaintiff or his family in the occupancy of their home, although he has suffered no special damage or pecuniary loss on account thereof.[30]

§ 140. **Locality as an element to be considered.**—Whether smoke is a nuisance depends in many cases on the locality and surroundings.[31] A use of property in one locality and under some circumstances may be lawful and reasonable, which, under other circumstances, would be unlawful, unreasonable and a nui-

25. Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654. That health need not be endangered to render a thing a nuisance see §§ 87, 129, 166, herein.

26. Cleveland v. Citizens' Gaslight Co., 20 N. J. Eq. 201.

27. Mulligan v. Elias, 12 Abb. Prac. (N. Y.) 259.

28. Gaskell v. Bayley, 30 L. T. N. S. 516.

29. Rex v. Neil, 2 C. & P. 485.

30. Kirchgraber v. Lloyd, 59 Mo. App. 59.

31. St. Paul v. Gilfillan, 36 Minn. 298; Neuhs v. Grasselli Chemical Co., 5 Ohio U. P. 359. Locality as affecting question of nuisance, see §§ 54, 96, 97, 98, 127, 128, 140, 165, 184, 186, 203, herein.

sance.[32] Neighbors must endure the reasonable inconveniences which result from neighborhood, and these inconveniences vary in kind and in extent, according to the circumstances of place and quality of the population.[33] Some trades may be nuisances in cities which would be harmless in the country.[34] And, on the other hand, one living in the city must submit to annoyances incidental to city life. Manufacturing establishments are an essential and necessary factor in the growth and development of cities, and though there may be an interference to some extent, in certain parts of a city, with the comforts of life, or the beauty or cleanliness of a city may be affected thereby, yet the prosperity of the city being dependent on the manufacturing interest, the comfort of the individual must in such case yield to the public good.[35] People living in cities do so voluntarily, and are obliged to submit to peculiarities and discomforts incident to the carrying of its industries.[36] In those communities where great works have been erected and carried on and which have been the means of developing the national wealth, a person can not stand upon extreme rights and maintain an action for every matter of annoyance, since if this could be done it would destroy business in such localities.[37] So it has been declared that: "In determining the question of nuisance from smoke or noxious vapors, reference must always be had to the locality, the nature of the trade, the character of the machinery, and the manner of using the property producing the annoyance and injury complained of. A party dwelling in the midst of a crowded commercial and manufacturing city cannot claim to have the same quiet and freedom from annoyance that he might rightfully claim if he were dwelling in the country. Every one taking up his abode in the city must expect to encounter

32. Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567.

33. Carpenter v. La Ville de Maisouneuve, Rap. Jud. Queb. 11 C. S. 242.

34. Whitney v. Bartholomew, 21 Conn. 213, 218.

35. Louisville Coffin Co. v. Warren, 78 Ky. 400; Culver v. Ragan, 8 Ohio C. D. 125, 15 Ohio C. C. 125; Huckenstine's Appeal, 70 Pa. St. 102, 10 Am. Rep. 669.

36. Huckenstine's Appeal, 70 Pa. St. 102, 10 Am. Rep. 669.

37. Tipping v. St. Helens Smelting Co., 4 B. & S. 608. See Bamford v. Turnley, 3 B. & S. 66.

the inconveniences and annoyances incident to such community, and he must be taken to have consented to endure such annoyances to a certain extent."[38] And in another case it is said: "It is true that in places of population and business not everything that causes discomfort, inconvenience and annoyance, or which, perhaps, may lessen the value of surrounding property, will be condemned and abated as a nuisance. It is often difficult to determine the boundary line in many such cases. The carrying on of many legitimate businesses is often productive of more or less annoyance, discomfort and inconvenience, and may injure surrounding property for certain purposes, and still constitute no invasion of the rights of the people living in the vicinity."[39] But although one residing in a city must endure certain annoyances or inconveniences, yet this does not obligate him to endure substantial annoyances or inconveniences which, by the exercise of reasonable care the one responsible therefor could avoid, and which cannot be regarded as a necessary incident of living in a populous community. So where a most disagreeable and serious discomfort was caused to a person by the emission of soot from a smokestack which could have been so used as to avoid this result it was held to be a nuisance which was properly restrained by injunction.[40]

§ 141. No distinction made as to classes of persons.—In determining whether smoke is a nuisance no distinction as to classes of persons should be made. The fact that persons affected thereby are artizans or laborers who may to some extent be accustomed to some degree of smoke, soot or cinders in working at their trades or occupations, does not remove them from the protection of the law. They are, nevertheless, entitled to the same remedy and to the application of the same rules as control in the case of persons who are accustomed to more luxurious surroundings.[41] The court

38. Dittman v. Repp, 50 Md. 516, 522, 33 Am. Rep. 325, per Alvey, J. See, also, Euler v. Sullivan, 75 Md. 616, 23 Atl. 845; Tipping v. St. Helens Smelting Co., 4 B. & S. 608, 11 H. L. Cas. 642, 650.

39. People v. White Lead Works, 82 Mich. 471, 478, 46 N. W. 735, 9 L. R. A. 722, per Grant, J.

40. Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. R. 51.

41. Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654.

said, in this case: "I find no authority that will warrant the position that the part of a town which is occupied by tradesmen and mechanics for residences and carrying on their trades and business, and which contains no elegant and costly dwellings, and is not inhabited by the wealthy and luxurious, is a proper and convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families by offensive smells, smoke, cinders or intolerable noises, even if the inhabitants are themselves artisans, who work at trades occasioning some degree of noise, smoke and cinders. Some parts of a town may, by lapse of time, or prescription, by the continuance of a number of factories long enough to have a right as against every one, be so dedicated to smells, smoke, noise and dust, that an additional factory, which adds a little to the common evil, would not be considered at law a nuisance, or be restrained in equity. There is no principle or the reason on which its rules are founded, which should give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer and their families, the fewer and more restricted comforts which they enjoy."[42] And in another case it is also declared by the court: "Whatever is offensive physically to the senses, and by such offensiveness makes life uncomfortable is a nuisance; and it is not the less so because there may be persons whose habits and occupations have brought them to endure the same annoyances without discomfort. Other persons, or classes of persons, whose senses have not been so hardened, and who, by their education and habits of life, retain the sensitiveness of their natural organization, are entitled to enjoy life in comfort as they are constituted. The law knows no distinction of classes, and will protect any citizen or class of citizens from wrongs and grievances that might perhaps be borne by others without suffering or much inconvenience."[43]

42. Per The Chancellor. See, also, Hurlbutt v. McKone, 55 Conn. 31, 10 Atl. 164, 3 Am. St. R. 17.

43. Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201, 206, per The Chancellor.

§ 142. That others contribute to nuisance no defense.—Each person who acts in maintaining a nuisance is liable for the resulting damage. If he acts independently and not in concert with others he is liable for the damages which result from his own act only.[44] And the fact that it is difficult to measure accurately the damage which was caused by the wrongful act of each contributor to the aggregate result does not affect the rule, nor make any one liable for the acts of others.[45] So in an action for a nuisance caused by the emission of smoke from the chimney of a factory it is no defense thereto that smoke and cinders are emitted from other factories in that vicinity, the defendant being liable for the nuisance caused by the emission of smoke from his factory.[46]

§ 143. What constitutes a nuisance by emitting smoke—Particular instances.—A person cannot carry on a manufacturing business so as to render the air impure and offensive and injurious to the health of the occupants of a dwelling house.[47] So smoke, soot, and cinders from the mill of a defendant causing great inconvenience and annoyance to the plaintiff in his occupation of his dwelling may be abated by suit.[48] And it is an actionable nuisance for a person to build his chimneys so low as to cause the smoke to enter his neighbor's house, and it is no defense thereto that the chimneys were higher than were required by the city regulations for chimneys.[49] And where a plaintiff who was an owner of certain ice in the Hudson river complained of a nuisance consisting of the operation by a cement company of its plant in

44. Harley v. Merrill Brick Co., 83 Iowa, 73, 48 N. W. 1000, citing Loughran v. Des Moines, 72 Iowa, 386, 34 N. W. 172; Ferguson v. Manufacturing Co., 77 Iowa, 578, 42 N. W. 448; Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451; Sellick v. Hall, 47 Conn. 273. See, also, § 164, herein.

45. Harley v. Merrill Brick Co., 83 Iowa, 73, 48 N. W. 1000, citing Chipman v. Palmer, 77 N. Y. 53; Lull v. Improvement Co., 19 Wis. 101.

46. Euler v. Sullivan, 75 Md. 616, 23 Atl. 845.

47. Wesson v. Washburn Iron Co., 13 Allen (Mass.), 95, 90 Am. Dec. 181; Carpentier v. Maisonneuve, Rap. Jud. Queb. 11 C. S. 242.

48. Hyatt v. Myers, 71 N. C. 271.

49. Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. Ed. 739, 2 Sup. Ct. 719. See Whalen v. Keith, 35 Mo. 87.

such a manner as to throw, when the wind was in the right direction, cinders, ashes, clay dust, coal dust and soot upon the ice, which substances sank into the ice and rendered it unmerchantable, it was decided that the plaintiff was entitled temporarily to enjoin the operation of such plant in the manner complained of during the season for harvesting ice.[50] And in an action to enjoin the maintenance of a nuisance consisting of smoke, fumes, soot and noise from the operation of iron works, a partial defense that the plaintiff with a full knowledge of the defendant's works, and a long time after such works were constructed and operated by the defendant purchased the premises mentioned in the complaint, for the purpose of compelling the defendant to purchase them from the plaintiff at an advanced and increased price, is demurable.[51] Again, where the dust and chaff from a grain threshing machine on adjoining premises enter plaintiff's house, to the annoyance of his family and the injury of his furniture, it will constitute a nuisance.[52] So the operation of coke ovens in such a manner as to cause the smoke and gases therefrom to injure the health of the occupants of a dwelling house and to depreciate the value of such house may be restrained.[53] And where, by the operation of an electric light plant, smoke and dirt are cast upon adjoining property the proprietor of such plant will be liable to the adjoining owner in damages for the depreciation in value of his property.[54] And where the defendant erected a planing machine and circular saw, driven by steam, and was in the habit of burning the pine shavings and other refuse and he took no means to consume or prevent the smoke which was carried onto plaintiff's premises in such quantities as to be a nuisance it was decreed that the defendant should desist from using his

50. American Ice Co. v. Catskill Cement Co., 43 Misc. R. (N. Y.) 221, 88 N. Y. Supp. 455.

51. Friedman v. Columbia Iron Works, 99 App. Div. (N. Y.) 504, 91 N. Y. Supp. 129. As to foundries see § 119, herein. As to smelting works see § 132, herein. As to steel furnaces see § 133, herein.

52. Winters v. Winters, 78 Ill. App. 417

53. McClung v. North Bend Coal & C. Co., 9 Ohio C. C. 259, 2 Ohio Dec. 531. As to coke ovens see § 112, herein.

54. Hyde Park Thompson-Houston Light Co. v. Porter, 64 Ill. App. 152. As to electric light plants see § 114, herein.

steam engine in such a manner as to occasion damage or annoyance to the plaintiff from the smoke.[55]

§ 144. **Same subject—Blacksmith's shop.**—The business of a blacksmith, though necessary and useful, should be carried on so as not to injure others, and where such a business was conducted within twelve feet of plaintiff's hotel and he was injured in his property, comfort and convenience by the black cinders, dust and ashes arising from the shop it was decided that the jury would be authorized to infer that the defendant was guilty of a nuisance.[56] And where the plaintiff was the owner of a dwelling house and land, and the defendant was in the occupation of a lot of land adjoining the plaintiff's land, upon which was a large carriage factory and a blacksmith's shop having several chimneys and the shop and chimneys were placed upon or very near the dividing line of the lands of the parties, and in consequence of the location and use of the blacksmith's shop, the cinders, ashes, and smoke issuing therefrom, were thrown in large quantities upon the plaintiff's house and land, rendering the water unfit for use and the house nearly untenantable, it was held that the defendant was liable for such injury.[57]

§ 145. **Same subject—Brick and lime kilns.**— Where the process of brickmaking constitutes a private nuisance by the communication of smoke and vapor which become mixed with the air supplied to the house of another and constitutes such an inconvenience as to materially interfere with the ordinary comfort of human existence an injunction will be granted to restrain the further burning of bricks so as to occasion such inconvenience.[58] And where it appears that the smoke, gases and vapors from a brick kiln settle upon and destroy the crops of another, it is no

55. Cartwright v. Gray, 12 Grant Ch. (Ont.) 399.

56. Norcross v. Thoms, 51 Me. 503, 81 Am. Dec. 588. As to blacksmith shop see, also, § 107, herein.

57. Whitney v. Bartholomew, 21 Conn. 213.

58. Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567; Walter v. Selfe, 4 Eng. L. & Eq. 15; Cavey v. Ledbitter, 13 C. B. (N. S.) 470; Roberts v. Clarke, 18 L. T. (N. S.) 49. As to brick, lime and lumber kilns, see § 111 herein.

defense to an action by the latter against the proprietor of the brick kiln that the injury resulted from a reasonable use of defendant's plant, or that his brick kilns were built after the most approved patterns and that it employed skilled persons in burning the bricks.[59] So a brick-kiln affecting an ordinary dwelling with smoke therefrom is a nuisance and it can not be urged as a reason why an injunction should not be granted that the owner has a prescriptive right to another kiln nearer to the dwelling and almost in a line with that complained of.[60] And the business of brick burning was enjoined where it appeared from the evidence that both the plaintiff and his wife had suffered in their health from the noxious air which had been emitted while carrying on such business, and that the wife had been afflicted with nausea from that cause, and that they had been obliged to keep the windows and doors of their house shut in order to exclude the corrupted air.[61] And where the smoke and smells from the business of brick burning injured the comfort and enjoyment of the plaintiff and in many cases had destroyed ornamental trees, an injunction restraining the plaintiff from carrying on such business was granted though it was carried on for the purpose of fulfilling a contract for government fortifications, it appearing that the business could be carried on elsewhere without inconvenience to the plaintiff.[62] And in another case, where an action was brought to restrain the operation of a lime-kiln it was said: "By the use of the defendant's lime-kilns, in the manner described by the witnesses, the effects are produced which render the air more or less impure when filled with the smoke and gas escaping upon the plaintiff's premises and into his dwelling; the air is rendered unwholesome and disagreeable, and unpleasant to inhale. In other words, the plaintiff's premises are rendered unfit for a comfortable habitation, and to persons of sensitive lungs, the smoke and gas when inhaled are alike unpleasant and uncomfortable, as well as to some

59. Powell v. Brookfield Pressed Brick Co. (Mo. App., 1904), 78 S. W. 646, 648.

60. Bareham v. Hall, 22 L. T. (N. S.) 116.

61. Pollock v. Lester, 11 Hare, 266.

62. Beardmore v. Tredwell, 31 L. J. Ch. (N. S.) 116.

extent detrimental to health. . . . The plaintiff is entitled to enjoy his premises free from the presence of smoke, gas, and dust proceeding from the defendants' kiln, and the defendants have no right thus to pollute the air and disturb the comfortable habitation of, and the enjoyment of, the plaintiff's premises."[63] But an injunction restraining the manufacture of brick on adjoining premises was refused where the only injuries shown were a slight discoloration of the foliage of some of the trees on complainant's land and an occasional perceptible odor in complainant's house from the gases from the kiln which were annoying to her because of her health, and would not have injured a person of ordinary health.[64]

§ 146. **When party not entitled to relief.**— Where the injury complained of is occasional and is such that it can be compensated for in an action at law, it has been decided that the plaintiff will not be entitled to an injunction.[65] So where the plaintiff, who was engaged in the business of weaving cocoanut fibre into mats, for which purpose the matting had to be immersed in bleaching liquids and then hung out to dry, complained of injury to his fabrics by reason of fumes from a manufacturing process carried on upon adjoining premises, by reason of which the color of the mats was permanently injured, it was decided that an injunction would not be issued, but the plaintiff would be left to his remedy at law, it appearing that extra precautions were taken to avoid any such result and that the injury complained of had been only accidental and occasional.[66] And where plaintiff, who owned a pond from which he cut ice for family use, brought a suit to restrain defendant from using soft coal or other fuel that would interfere with or injure the property or business of the plaintiff and for an assessment of damages, it was decided that as there was no finding that any unusual or extraordinary volumes of smoke issued from defendant's chimney at any time and that if any smoke or cinders were deposited they contributed slightly, if at all, to the injury to

63. Hutchins v. Smith, 63 Barb. (N. Y.) 251, 258, per Hardin, J.

64. Ladd v. Granite State Brick Co., 68 N. H. 185, 37 Atl. 1041.

65. Nelson v. Milligan, 151 Ill. 462, 38 N. E. 239.

66. Cooke v. Forbes, L. R. 5 Eq. Cas. 166.

the ice, and the damage done by them was insignificant as compared with that resulting from other causes, the plaintiff was not entitled to an injunction as it would inflict great and unnecessary injury on defendant; and it was also decided that he was not entitled to damages.[67] In this case it was said: "To entitle the plaintiff to relief, the injury, of which he complains, must be certain and substantial, and not slight or theoretical. The right is not a right to absolute purity, any invasion of which would give a right of action, but it is a right to such a degree of purity as taking all the circumstances into account the plaintiff is reasonably entitled to."[68]

§ 147. **Where business legalized.**— Where smoke is caused by the carrying on of a trade or business which is legalized under authority from the sovereign and such trade or business is conducted in a proper and careful manner and the smoke complained of is a necessary result thereof, it will not constitute a nuisance.[69]

So smoke from a distillery which has been legalized by a city and is conducted properly and with due regard to the police regulations of the city, has been held not a nuisance.[70] So fuel is incidental to the operation of a railroad, which has been authorized by law, and proper structures are necessary to supply the same at convenient points on the line of the road, and dust and smoke from a coal chute, properly constructed and operated, is not a nuisance, of which one, whose land does not adjoin the right of way can complain.[71] And smoke issuing from an opening in a railroad tunnel, by reason of the aperture being enlarged, the railway being authorized, is not a nuisance, in the absence of negligence on the part of the campany, the damage complained of being held to arise from the operation of the road and not from the alteration.[72] If, however, the smoke is caused by the negligent operation of the road, the company will be liable.[73] And the creation

67. Downing v. Elliott, 182 Mass. 28, 64 N. E. 201.

68. Per Morton, J.

69. See Chap. VI, herein.

70. Lewis v. Behan, Thorn & Co., 28 La. Ann. 131.

71. Densmore v. Central I. R. Co., 72 Iowa, 182, 33 N. W. 456.

72. Attorney-General v. Metropolitan R. Co. (C. A.), (1894) 1 Q. B. 384.

73. Louisville & N. R. Co. v. Orr, 12 Ky. Law R. 756, 15 S. W. 8.

of a nuisance by the emission of smoke from a smoke stack of a steam engine is held not justified by the granting of a license by the board of supervisors for the erection and maintenance of such engine.[74] And authority conferred by charter to maintain and carry on a brick kiln, is no defense to an action for a nuisance caused thereby as where the smoke and gas therefrom destroyed the crop of another.[75]

§ 148. **Action for removal of smokestack.**—To authorize a court to remove a valuable structure as a nuisance, damages must be proved of a substantial and continuing character. This principle has been enunciated in a recent case in Missouri and applied in an action to enjoin the maintenance of a sheet iron smoke stack on defendant's building within a few feet of a building owned by the plaintiff. The smoke stack occupied about one-third of the width of an alley between the two buildings and on account of the heat from it, it was necessary in the summer time to close windows in offices in the building owned by the plaintiff which were rendered untenantable. Light and air was also obstructed thereby. The court granted the relief sought by the plaintiff, holding that the smoke stack as maintained by the defendant constituted a nuisance.[76]

§ 149. **Constitutionality of legislative act making smoke a nuisance.**—In the exercise of the former possessed by the legislature of a State to declare that a nuisance which is not one *per se* or was not one at common law,[77] it may declare the emission of dense, opaque smoke into the open air of cities having a population of one hundred thousand inhabitants, a nuisance. And such a statute is not rendered unconstitutional by reason of a proviso therein that an owner of premises may be exempt where he can show to the satisfaction of the court or jury trying the facts that there is no known practicable device, appliance, means, or method by application of which to his building or premises, the emission

74. Sullivan v. Royer, 72 Cal. 248, 13 Pac. 655, 1 Am. St. R. 51.

75. Powell v. Brookfield Pressed Brick Co. (Mo. App.), 78 S. W. 646, 648.

76. St. Louis Safe Dep. & S. Bank v. Kennett Estate (Mo. App., 1903), 74 S. W. 474.

77. See §§ 81-84, herein.

or discharge of the dense smoke complained of could have been prevented.[78] One of the grounds upon which the constitutionality of this statute was attacked in this case, was that the legislature had invaded the judicial province by declaring that to be a nuisance which was not inherently one. Upon this point it was declared by Gault, P. J.: "Because at common law smoke was not a nuisance *per se* is no reason why the people of this State, through their representatives in the legislative department, may not change that law, and make it a nuisance *per se* when the location and surrounding circumstances, in their opinion and judgment, require it. . . . It was entirely competent for the legislature to take cognizance of the fact known to all men that the emission and discharge of dense smoke into the atmosphere of a large and populous city is of itself a nuisance, a constant annoyance to the general health of such city, and one calculated to interfere with the health and comfort of the inhabitants thereof, and to declare it a nuisance *per se*. . . . It had the power and must be presumed to have inquired into the actual conditions as to the effect of emitting large quantities of dense smoke in cities having a population of one hundred thousand people and the resulting injury to the health and comfort of the public therein, as well as the probable injury to the property owners in requiring them to use smoke consuming devices, and the discretion exercised by them within their conceded powers we have no power to control unless it involves a violation of some right protected by the constitution."

It was also contended in this case that the statute was in the nature of a special law and also unconstitutional, upon which point it was also said: "That it is a general law in that it applies alike to all cities having or which may hereafter have a population of one hundred thousand inhabitants, and to all persons residing therein is clear from its reading. But it is insisted that it is obnoxious class legislation; that if it is a nuisance to emit and discharge dense smoke in a city of one hundred thousand inhabitants it is equally so in a city of one-half or one-quarter or one-tenth that size. . . . But we think that the classification is not an unreasonable one. If one corporation or individual may with

78. State v. Toner, 185 Mo. 79, 84 S. W. 10.

impunity emit and discharge volumes of dense opaque smoke into the air of a city of one hundred thousand people, then all other corporations, manufactories and citizens may do likewise, and it is obvious that the proportion of smoke and discomfort will be much greater than if manufactories and citizens do the same things in less populous cities, where experience shows the demand for such works is much less, and the consequent accumulation of smoke correspondingly less. . . . The legislature had the right to inquire into the relative evils resulting from the emission of dense smoke in large and populous cities. The suppression of the nuisance was clearly a legislative power and the whole matter was in the discretion of the legislature, and it must be presumed that its classification was based upon satisfactory evidence. Accordingly we hold that in providing that the law should be confined in its operation to cities of one hundred thousand inhabitants it did not transcend its authority. But it is further argued under this objection that the act is class legislation in that it exempts owners of premises who may be able to show to the satisfaction of the court or jury trying the facts that there is no known practicable device, appliance, means or method by application of which to his building or premises, the emission or discharge of the dense smoke complained of could have been prevented. . . . It is too plain for argument that it was within the power of the Legislature of Missouri to enact all reasonable regulations for the suppression and prevention of the accumulation of vast quantities of dense smoke in our populous cities, and they did so by the Act of 1901, but it is to their credit that they were careful to abstain from even a semblance of oppression and an invasion of the property rights of owners and managers of buildings to heat the same or to maintain engines and boilers for the manufacture of wares and merchandise, by providing that if there were no known practicable devices or appliances by which dense smoke so generated could be prevented, they should not be punished therefor. It was entirely competent for the legislature to make this exception, as it did, available not to a certain class, but to every citizen or corporation charged with a violation of the said smoke act. . . . Our conclusion is then that the proviso did not render the act unconstitutional as class legislation."

The additional claim was also made in this case that the act was in violation of the 14th amendment to the Federal Constitution because by implication it omitted from its operation locomotive engines and steamboats. This contention of the defendant the court also did not sustain, saying: "Conceding that locomotive engines and steamboats are not included in the term of any building, establishments or premises, the conclusion reached by the court in Moses v. United States,[79] that there is a reasonable basis for the classification of stationary engines and buildings in one class, and portable engines in another, appears to us to be sound and sustainable on reason and authority. As to the further contention that brick kilns do not fall within the application of the statute, we think it is not well taken. The act by its terms includes any building, establishment or premises from which dense smoke is so emitted or discharged, and is broad enough to include brick kilns."

§ 150. **Power of municipality to regulate emission of smoke.**—The power which a legislature possesses to declare that a nuisance which was not one at common law may be delegated to a municipality.[80] So, it is competent for a city to pass a reasonable ordinance looking to the suppression of smoke when it becomes a nuisance to property or health, or annoying to the public at large, provided such ordinance is not in excess of the powers conferred upon the municipality.[81] So, an ordinance as follows: "The owner or owners of any boat or locomotive engine, and the person or persons employed, as engineer or otherwise, in the working of the engine or engines in said boat, or in operating such locomotive, and the proprietor, lessee or occupant of any building, who shall permit or allow dense smoke to issue or be emitted from the smoke stack of any such boat or locomotive, or the chimney of any building, within the corporate limits, shall be deemed and held guilty of

79. 16 App. D. C. 428.

80. Glucose Refining Co. v. City of Chicago, 138 Fed. 209, 217; Langel v. Bushnell, 197 Ill. 26, 63 N. E. 1086, 58 L. R. A. 266; Harmon v. Lewiston, 153 Ill. 313, 38 N. E. 628, 46 Am. St. R. 893; Dillon on Munic. Corp. (4th Ed.) § 608.

81. St. Louis v. Heitzeberg Packing & P. Co., 141 Mo. 375, 42 S. W. 954, 39 L. R. A. 551, 64 Am. St. R. 516. See, also, sections following herein.

creating a nuisance, and shall for every such offense, be fined in a sum not less than five dollars nor more than fifty dollars," is valid and not objectionable on the ground that it excepts certain persons and property from its operation and therefore conflicts with a constitutional provision that the legislature shall not pass any local or special laws in certain enumerated cases, among which is "granting to any corporation, association or individual any special or exclusive privilege or immunity or franchise whatever." Such an ordinance is general in its provisions, embraces all persons or property within the limits of the corporation and imposes the same penalty upon all persons maintaining a nuisance in violation of its provisions.[82] And an ordinance making "any owner, agent, lessee or manager of any building or other structure in the city of Detroit" liable to a penalty for causing the emission of dense smoke to be emitted from such a structure and which excepts dwelling houses and steamboats from its operation is not invalid because of such exception, as being an unreasonable discrimination between classes of persons residing within the same municipality.[83] And where a municipality has power to provide that dense smoke shall in certain instances constitute a nuisance, the ordinance will not be invalid from the mere fact one may be able to comply with it without making any change in his property while another must make certain alterations to conform thereto.[84] Such an ordinance making "the proprietor, lessee or occupant" of a building responsible for the emission of smoke therefrom has been held not to render the servant of the owner responsible, the expression of one thing being held to exclude another.[85] A grant of powers to a municipality must be strictly construed.[86] And an ordinance which is in excess of the powers conferred on a city to declare and abate nuisances, and

82. Harmon v. City of Chicago, 110 Ill. 400, 51 Am. Rep. 698; Glucose Refining Co. v. City of Chicago, 138 Fed. 209.

83. People v. Lewis, 86 Mich. 273, 49 N. W. 140. Compare State v. Sheriff of Ramsay County, 84 Minn. 236, 51 N. W. 112, 31 Am. St. R. 650.

84. Glucose Refining Co. v. City of Chicago, 138 Fed. 209, 217.

85. St. Paul v. Johnson, 69 Minn. 184, 72 N. W. 64.

86. Sigler v. Cleveland, 3 Ohio N. P. 119, 1 Ohio L. D. 166.

which is wholly unreasonable, will not be upheld.[87] In this case it was said by the court: "Now this ordinance would punish every housekeeper who kindled a fire to cook his or her morning meal, or to warm the house. Every replenishing of the furnace, whether in the heart of the business centres or upon the remote western boundary of the city, would alike subject the owner to punishment. No exception whatever is made as to time or quantity. When it is considered, and it must be by this court, that St. Louis has attained its growth in population and wealth in a large degree from the fact of its proximity to the great mines of bituminous coal which lie at its very door, and that this fuel has enabled it to become a great manufacturing city, and that this soft coal is peculiarly liable to produce this objectionable dense smoke, it seems to us that this ordinance which makes no reasonable allowance for the regulation of this smoke, but essays in advance of any known device for preventing it, to punish all who produce it to any degree whatever, is wholly unreasonable.[88] So it is decided in a case in Minnesota that power conferred upon a city to remove or abate nuisances injurious to public health or safety refers to things which are nuisances *per se*, and not to those which may or may not become nuisances, and confers no power on a city to define and declare what shall constitute a nuisance, and that an ordinance declaring the emission of dense smoke from chimneys and smoke stacks to be a public nuisance is unauthorized.[89]

§ 151. **Same subject—Words "Dense smoke" construed.**—The term "dense smoke," as used in an ordinance prohibiting the emission thereof, will be construed as commonly understood. A court will not indulge in any subtle distinctions as to what is meant thereby, but will construe it as ordinarily understood by people in general.[90]

87. St. Louis v. Heitzeberg Packing & P. Co., 141 Mo. 375, 42 S. W. 954, 39 L. R. A. 551, 64 Am. St. R. 516.

88. Per Gantt, J.

89. St. Paul v. Gilfillan, 36 Minn. 298, 31 N. W. 49.

90. Harmon v. City of Chicago, 110 Ill. 400, 51 Am. Rep. 698.

§ 152. **Ordinance limiting emission of smoke from a chimney to "three minutes in any hour" construed.**—Where by ordinance the emission of dense smoke from a chimney or smoke stack of any building, factory, mill, works or other establishment is limited to three minutes in any hour of the day or night (excepting in cases where the fire box is being cleaned out or new fire built therein, in which case the limit shall be six minutes), it will not be regarded as operating unequally and therefore unconstitutional from the fact that a chimney for one establishment may discharge smoke for less fire boxes than a chimney for another where the ordinance provided that no prosecution can be had against plants installed prior to the passage of the ordinance until the expiration of a year from its passage, in order to rebuild and re-equip the same, provided the owner commences at once his plans so to do.[91] The court said in this case: "It is seen complainant had a year in which to construct its plant so as to enable it to comply with the ordinance, and it nowhere appears that complainant, by some alterations in its plant, could not comply with the provisions thereof. If it is to be admitted that each fire box is to have the privilege of smoking one-twentieth of an hour, then it is manifest the ordinance would permit complainant's chimney to smoke practically all the time, which would defeat, of course, the object of the ordinance.[92]

§ 153. **Ordinance regulating smoke from tug boats—Not violation of commerce clause of Constitution.**— A city may by ordinance prohibit the emission of dense smoke from tug-boats in its harbor, and such an ordinance is not in violation of the commerce clause of the Federal constitution. This question arose in Harmon v. City of Chicago,[93] in which it was decided that an ordinance prohibiting the emission of dense smoke from any tug-boat plying in the Chicago river was not in violation of the provision of the Federal Constitution conferring upon Congress the power to regulate commerce. It was said by the court in this case: "This objection implies a misconception of the scope and purpose of the ordinance. Undoubtedly these tug-boats are in a limited sense

91. Glucose Refining Co. v. City of Chicago, 138 Fed. 209, 216.

92. Per Kohlsaat, C. J.

93. 110 Ill. 400, 51 Am. Rep. 698.

engaged in commerce among the States, and perhaps with foreign nations. . . . But does this ordinance impose any restraint on the use of such vessels, although engaged in general commerce, other than is consistent with law? It is thought it does not. At most it purports only to regulate their use in such manner as may not produce effects detrimental to property and business, nor become a personal annoyance to the public at large within the city, and that is allowable to be done. Two sources of power for regulating the use of steam tug-boats in the harbor and river are discoverable: First, the city, by direct grant of power from the State, has the right to make regulations in regard to the use of harbors, towing of vessels, opening and passing of bridges; and second, the police power inherent in the State,—that power under which everything necessary to the protection of the property of the citizen, and the health and comfort of the public may be done. Controlling the use of tug-boats in towing in and out vessels to and from the harbor, is in no sense in conflict with the power existing in Congress to regulate commerce with foreign nations and among the several States. That is very far from an attempt to regulate commerce. . . . Regulating the use of fuel, or what is the same thing, requiring owners or managers of tug-boats to so use their vessels as not to create a dense smoke, which it is conceded would be an annoyance to the public at large, is in no sense imposing any restraints upon commerce, nor does it in any manner conflict with the power of Congress under what is called the "Commerce Clause" of the Constitution of the United States. . . . The existence of a power in Congress to control the harbor, and the towing in and out of merchant vessels engaged in commerce with foreign nations, and with the several States, does not, of itself, prevent local legislation for the security of property, and the health, comfort and convenience of the people in a municipality. It is only repugnant and interfering State legislation that must give way to the paramount laws of Congress constitutionally enacted." [94]

§ 154. **Municipal ordinance as to smoking in street cars.**—A municipality may by ordinance make smoking upon street cars a

94. Per Mr. Justice Scot.

nuisance.[95] In this case the court said: "There is no doubt of the fact that smoking in the street cars in the city of New Orleans had caused to the great majority of people using them material annoyance, inconvenience and discomfort. This is particularly so in the winter season, when the cars are closed. There is not only discomfort, but positive danger to health from the contaminated air. The record established these facts. Smoking in itself is not to be condemned for any reason of public policy. It is agreeable and pleasant, almost indispensable, to those who have acquired the habit, but it is distasteful and offensive, and sometimes hurtful to those who are compelled to breathe the atmosphere impregnated with tobacco in close and confined places. There are many other habits in manners and conduct which in some localities and places are not objectionable to the public, but when committed elsewhere may become offensive, and the subject of penal municipal legislation. Smoking may be classed among these subjects of legislation by the municipal corporation."[96]

§ 155. **Sufficiency of notice to abate—English Public Health Act.**—Under the English Public Health Act,[97] as to the giving of a notice to abate a nuisance and providing that the notice required to abate the same shall be to the person causing the nuisance "to abate the same within a time to be specified in the notice and to execute such works and do such things as may be necessary for that purpose," a notice requiring a person to abate a nuisance consisting of the emission of black smoke from his factory chimney without specifying the works to be done, has been held sufficient, no works being required to be done but only the black smoke stopped.[98]

§ 156. **Damages recoverable.**—In an action for damages for nuisance caused by smoke and fumes causing substantial annoyance and discomfort to one in the occupation and use of his dwelling, it has been said that it is impossible to lay down any specific

95. State of Louisiana v. Heidenhain, 42 La. Ann. 483, 7 So. 621, 21 Am. St. R. 388.

96. Per McEnery, J.

97. Act 1875, § 94.

98. Millard v. Wastall (Q. B.), 77 Law T. R. 692, 67 L. J. Q. B., N. S. 277.

rule to guide the jury in their estimate, but that they may consider the injury to the reasonable use of the property, the effect upon the health of the plaintiff and his family, and his actual physical discomfort, the amount to be determined by the jury in their best judgment and soundest discretion.[99] This question is considered in a recent case in New York, which was an action by the proprietors of a hotel to recover damages resulting from the maintenance of a nuisance by the defendant, in which it appeared that the defendant had constructed and put in operation an electric lighting and power plant near the hotel of the plaintiff. The complaint alleged that the defendant had so constructed and operated its machinery as to discharge upon the premises of the plaintiff great quantities of soot, cinders, ashes, noisome gases, unpleasant odors, and steam and water condensing from steam, thus fouling and injuring the premises of the plaintiff and the furniture therein. A nuisance from noise, jar and vibration was also alleged, disturbing the sleep of the inmates of the hotel and injuriously affecting the quiet and peaceful enjoyment and use by them of their apartments. Upon the trial of the action the defendant requested the court to charge that: "The measure of damages applicable to a case of this kind is the actual diminution in rental by reason of defendant's acts," and also that "loss of income is not provable as an element of damage." The first request was refused upon the ground that though diminution of rental value is an element to be considered and for which compensation might be given, yet the recovery was not limited to an allowance therefor where it appeared that evidence was given in support of the complaint showing that the curtains and furniture of the hotel became soiled, that new upholstering was necessary much oftener than before the plant became a nuisance, and that the service of an extra man became necessary to do the cleaning, whose services cost from twenty to twenty-five dollars per month. As to the second request, it was

99. Farier v. American Car & Foundry Co., 24 Pa. Super. Ct. 579. Examine Hoffman v. Edison Elec. Illum. Co., 87 App. Div. (N. Y.) 371, 84 N. Y. Supp. 437, holding that, in an action by a tenant to recover damages for a nuisance consisting of smoke, gases, noise and vibrations, he has an election whether to have his damages measured by the depreciation in the rental value of the premises as a whole or by a loss in the usable value of the premises.

decided that as there was evidence showing depreciation in the rent of the rooms in the hotel which was competent upon the question whether there was a diminution in the rental value of the premises it was also properly refused.[100] Again, in an action by a lessee to recover damages for a nuisance caused by an electric lighting plant and consisting of smoke, gases, noise and vibrations, the plaintiff's right to recover will not be affected by the fact that he took his lease subsequent to the creation of the nuisance.[101]

100. Pritchard v. Edison Electric Illum. Co., 179 N. Y. 364, 72 N. E. 243, affirming 92 App. Div. 178, 87 N. Y. Supp. 225.

101. Hoffman v. Edison Electric Illum. Co., 87 App. Div. (N. Y.) 371, 84 N. Y. Supp. 437.

CHAPTER IX.

Noisome Smells.

SECTION 157. Noisome smells as a nuisance.
158. When smells constitute a nuisance.—Instances.
159. When not a public nuisance.—Private road.—Highway.
160. Causing smells to arise from another's land.
161. Though business lawful smell a nuisance.
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§ 157. **Noisome smells as a nuisance.**—Where the air is corrupted by noisome smells so as to substantially interfere with the ordinary comforts of human existence or to materially diminish the value of another's property, such smells constitute a nuisance.[1]

1. Winslow v. Bloomington, 24 Ill. App. 647; Bohan v. Port Jervis Gaslight Co., 122 N. Y. 18, 33 N. Y. St. R. 246, 25 N. E. 246, 9 L. R. A. 711, affg. 45 Hun, 257, 10 N. Y. St. R. 374; Catlin v. Paterson, 10 N. Y. St. R. 724; Gavigan v. Atlantic Ref. Co., 186 Pa. 604, 40 Atl. 834; Pottstown Gas Co. v. Murphy, 39 Pa. 257; Dutchtown Sulphur, Copper & I. Co. v. Barnes (Tenn., 1900), 60 S. W. 593; Fort Worth v. Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. R. 840; Waters-Pierce Oil Co. v. Cook, 6 Tex. Civ. App. 573, 26 S. W. 96; McIntosh v. Carritte, N. B. Eq. Cas. 406.

"It is an elementary law that the corrupting the air of a man's dwelling with noisome smells is a nuisance, for light and air are two indispensable requisites to every dwelling." Caro v. Metropolitan Elevated Ry. Co., 46 N. Y. Super. Ct. 138, 165, per Speir, J.

"Unpleasant odors, from the very constitution of our nature, render us uncomfortable, and when continued or repeated make life uncomfortable. To live comfortably is the chief and most reasonable object of men in acquiring property as the means of obtaining it; and any interference with our neighbor in the comfortable enjoyment of life, is a wrong which the law will redress. The only question is what amounts to that discomfort from which the law will protect."[2] So, where disagreeable odors are sent forth from adjoining premises and plaintiff is prevented from finding tenants for his house on account thereof, this is sufficient proof of special damages to entitle him to maintain an action to recover compensation therefor.[3] Where the smells are caused by the conduct of a business or trade it is immaterial whether the proprietor of the same was guilty of negligence, the question not being one of negligence or no negligence.[4] Nor is it any defense that the business could not be carried on without producing such smells.[5] Nor would it be any defense to show that others were violating the law. So it was held proper to exclude testimony offered by the defendant in an action for nuisance caused by odors from the refuse of his creamery as to how the management of the creamery maintained by him and the premises about it compared with the management of other creameries and the premises about them.[6] In a petition, however, for an injunction to restrain an intended act as a nuisance, as where it is sought to restrain the establishment of a dairy, on the ground that it will cause noxious and offensive smells, facts should be stated so that the consequences of such act may be determined by the court and it may see and decide that a nuisance may result.[7] And it has been held that a preliminary injunction restraining the conduct of a business because of offensive and noxious odors resulting therefrom will not

2. Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201, 205, per The Chancellor.

3. Cropsey v. Murphy, 1 Hilt. (N. Y.) 126.

4. Gavigan v. Atlantic Ref. Co., 186 Pa. 604, 40 Atl. 834. See § 92, *post*.

5. Ducktown Sulphur, Copper & I. Co. v. Barnes (Tenn., 1900), 60 S. W. 593.

6. Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82.

7. McDonough v. Robbens, 60 Mo. App. 156, 1 Mo. App. Rep. 78.

be granted where it appears that the plaintiff has sustained the same annoyance and discomfort for a long time and that the defendant has a large amount of capital invested in his business, which would be ruined by the granting of the injunction.[8] Again, in an action to recover for a nuisance where the only question is whether defendant's factory filled the surrounding air with offensive smells thereby creating a nuisance which specially injured the plaintiff, it is held to be improper to receive in evidence ordinances prohibiting a person from permitting the accumulation of offensive matter upon his premises or to conduct a certain business in an offensive, unclean, and defective manner.[9]

§ 158. **When smells constitute a nuisance—Instances.**—A nuisance has been held to exist in the case of noxious smells from the operation of a fertilizer factory,[10] elevated railway,[11] slaughter house,[12] rendering and fat boiling establishment,[13] bone burning establishment,[14] smelting works,[15] garbage plant,[16] and brick burning.[17] So, where oil used for fuel is negligently permitted to escape into a sewer by leakage through the soil and generate gases which escape through a man hole and cause damage to a bakery, the one permitting such leakage will be responsible for the injury

8. Sellers v. Parvis & Williams Co., 30 Fed. 164.

9. Danker v. Goodwin Mfg. Co., 102 Mo. App. 723, 77 S. W. 338.

10. Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 20 Atl. 900, 25 Am. St. R. 595, 9 L. R. A. 737; Evans v. Reading Chemical F. Co., 160 Pa. 209, 28 Atl. 702. See § 118, herein.

11. Caro v. Metropolitan Elev. Ry. Co., 46 N. Y. Super. Ct. 138.

12. Rhoades v. Cook, 122 Iowa, 336, 98 N. W. 122; Babcock v. New Jersey Stockyard Co., 20 N. J. Eq. 296. See Bishop v. Banks, 33 Conn. 118, 87 Am. Dec. 197; Attorney-General v. Steward, 20 N. J. Eq. 215. See §§ 126-129, herein.

13. Millhiser v. Willard, 96 Iowa, 327, 65 N. W. 325; Cropsey v. Murphey, 1 Hilt. (N. Y.) 126; Smith v. Cummings, 2 Pars. Eq. Cas. (Pa.) 92. See § 116, herein.

14. Meigs v. Lister, 23 N. J. Eq. 199.

15. Appeal of Pennsylvania Lead Co., 96 Pa. 116, 42 Am. Rep. 534; Stenett v. Northport Mining & S. Co., 30 Wash. 164, 70 Pac. 266. See § 132, herein.

16. Munk v. Columbus Sanitary Works Co., 7 Ohio N. P. 542, 5 Ohio S. & C. P. Dec. 548.

17. Fogarty v. Junction City Pressed Brick Co., 50 Kan. 478, 31 Pac. 1052, 18 L. R. A. 756; Campbell v. Seaman, 63 N. Y. 568, 20 Am. Rep. 567, affg. 2 Thomp. & C. 231. See § 111, *ante*, herein.

so caused, especially where the discharge of refuse, noxious liquids or drippings into a sewer is forbidden by a city ordinance.[18] And where a dam across a stream is erected which causes the water to stagnate and emit offensive odors, causing the entire neighborhood to become sickly, it will constitute a public nuisance for which an indictment will lie.[19] And the discharge of refuse from a canning factory into a stream of water may be enjoined as a nuisance where it is offensive in smell and dangerous to the health of the public.[20] Again, a privy will be a nuisance where it clearly appears from the facts that persons in the neighborhood are rendered uncomfortable to a substantial degree by the smells therefrom, but where the evidence does not show that it has been so kept as to render it a nuisance, the maintenance thereof will not be enjoined.[21] And where a railroad company placed ties on its right of way in front of plaintiff's residence and allowed water to collect about them and cause decay and decomposition and filthy and disagreeable odors, it was held that it was guilty of creating a nuisance for which it was liable in damages.[22] And where, by the cooking of offal in a vat noxious and nauseating odors were emitted, which could be detected more than a quarter of a mile away, and rendered the plaintiff's dwelling unfit for habitation, he was held to be entitled to an injunction against the continuance of the nuisance.[23] And a person may be enjoined from maintaining a tobacco dry house in the rear of an office building, where noxious and offensive odors therefrom which permeate the building are exceedingly annoying and disagreeable, and inconvenient, detrimental to the health of the owner and occupants of such building and seriously affect the comfortable enjoyment of the premises.[24] And where a cotton mill company maintained issues and outlets from the privies and cesspools of its factory into the public gutters

18. Brady v. Detroit Steel & S. Co., 102 Mich. 277, 60 N. W. 687, 26 L. R. A. 175.

19. State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737.

20. Butterfoss v. Board of Health, 40 N. J. Eq. 325.

21. Iliff v. School Directors, 45 Ill. App. 419.

22. Houston, E. & W. T. Ry. Co. v. Reasonover (Tex. Civ. App., 1904), 81 S. W. 329.

23. Wilcox v. Henry (Wash., 1904), 77 Pac. 1055.

24. Hundley v. Harrison, 123 Ala. 292, 26 So. 294.

of the city, through which offensive, dangerous and injurious matter flowed, to the detriment of the public health it was held to be a nuisance which might be enjoined on a bill by the board of health of the city.[25] But in a case against the city of New York to restrain the maintenance of a dump by the city it was decided that though there was some evidence that smells arose from the dump a finding that it was a nuisance was not justified, it not appearing how pungent or offensive the smell was or how far it extended, or that plaintiff was affected by it.[26]

§ 159. **When not a public nuisance—Private road—Highway.** —Noxious smells or odors will not constitute a public nuisance to persons passing along a private country road, and it is essential to show that the road used was a public highway in order to sustain an indictment.[27] And it has been decided in the case of a conviction for keeping a slaughter house in such a manner as to become a public nuisance to travelers upon a public road that proof that the smell is offensive to a few individuals will not constitute it a public nuisance in the absence of proof that it is an obstruction to a safe use of the road.[28]

§ 160. **Causing smells to arise from another's land.**— One who causes noxious smells to arise from the land of another may be liable for a nuisance.[29] So the throwing of slops and filth by a person onto another's premises, creating noisome and offensive odors, constitutes a nuisance.[30] And one may be enjoined from permitting refuse from a creamery to flow onto the land of another, where it becomes thickened and emits a stench.[31] And it has been

25. Board of Health v. Maginnis Cotton Mills, 46 La. Ann. 806, 15 So. 164. As to cotton gin see § 113, herein.

26. Coleman v. City of New York, 70 App. Div. (N. Y.) 218, 75 N. Y. Supp. 342, affirmed in 173 N. Y. 612. See Cornell v. New York, 20 N. Y. Supp. 314.

27. State v. Wolfe, 112 N. C. 889, 17 S. E. 528, citing 2 Bish. Cr. Law, § 1266, 1.

28. Phillips v. State, 66 Tenn. 151. As to slaughter houses, see §§ 126-129, herein.

29. Carland v. Aurin, 103 Tenn. 555, 53 S. W. 940.

30. Beckley v. Skroh, 19 Mo. App. 75.

31. Price v. Oakfield Highland Creamery Co., 87 Wis. 536, 58 N. W. 1039, 24 L. R. A. 333.

held that a person is liable for noxious vapors caused by his filling his lot with earth and garbage, thereby obstructing the natural drain of surface waters and making a stagnant pond.[32]

§ 161. **Though business lawful smell a nuisance.**— Though a business may be lawful in itself, yet if it causes noxious, offensive and injurious smells it may be restrained at the suit of one who has been injured thereby.[33] "The general proposition is that the citizen has the right to be protected against annoyances, noxious gases, etc., which materially lessen the comfort and value of his home, and if he cannot be protected against such annoyances by any one that may choose to erect a business near it, he will be driven from his home unless he is wealthy enough to buy all the land around him. The law takes care that lawful and useful businesses shall not be put a stop to on account of any trifling or imaginary annoyance, such as may offend the taste or disturb the nerves of a fastidious or over-refined person. But, on the other hand, it does not allow anyone, whatever his circumstances or conditions may be, to be driven from his home or to be compelled to live in it in positive discomfort, although caused by a lawful or useful business carried on in his vicinity. The maxim '*sic utere tuo ut alienam non laedas*' expresses the well-established rule."[34] So, upon the question of whether a tannery is a nuisance the fact that the business is a lawful one is immaterial for it becomes a nuisance where the smells therefrom substantially impair the comfort and enjoyment of adjacent owners.[35] So, though the business of manufacturing a fertilizer from the bodies of dead animals, offal and other matter may be lawful, it may be enjoined at the suit of an adjoining owner where the occupancy of his property has been rendered inconvenient, annoying and unhealthy on account of the noxious odors arising therefrom.[36]

32. Carland v. Aurin, 103 Tenn.

33. Barkan v. Knecht, 10 Wkly. Law Bull. 342, 9 Ohio Dec. 66; Ducktown Sulphur, Copper & I. Co., v. Barnes (Tenn., 1900), 60 S. W. 593. See § 99, *ante*, herein.

34. Ducktown Sulphur, Copper & I. Co. v. Barnes (Tenn., 1900), 60 S. W. 593.

35. Pennoyer v. Allen, 56 Wis. 502, 14 N. W. 609, 43 Am. Rep. 728.

36. Barkan v. Knecht, 9 Ohio Dec. 66, 10 Wkly. Law Bull. 342. As to fertilizer factories see § 118, herein.

§ 162. **Injury must be real.**—The fact that odors are unpleasant and disagreeable is not sufficient ground for invoking the aid of a court of equity to intefere with a business or other use of property causing the same. A real and not a fanciful injury must be shown. A substantial annoyance must be caused thereby or physical discomfort to a person or an injury to health or property.[37] Where a discomfort is claimed it must not be one which depends merely upon a fanciful taste or the imagination.[38] So where it was claimed that a nuisance was caused by a smell emitted from a slaughter house it was held proper to refuse to charge the jury that the defendant was liable if any impurity of the air was caused by the slaughter house.[39]

§ 163. **Effect upon persons of ordinary health and sensitiveness the test.**—Where a question arises whether a nuisance from odors exists it is to be determined by the effect produced upon persons of ordinary health and sensitiveness, and not by that upon persons who are afflicted with disease or abnormal physical conditions.[40] So it was held improper to refuse to charge the jury in an action for a nuisance in the escape of gases from lead works that "the effect of a peculiar and very exceptional idiosyncracy or susceptibility on the part of a person by which he or she may be affected by a slight trace of arsenic or lead which would not in any degree affect other persons, would not be such an injury as would of itself condemn the source of such effect as a nuisance."[41] So, a person may, it has been decided, in the lawful use of his premises in a village keep hens and the odors therefrom will not constitute a nuisance, it appearing that the hen houses and yard were

37. Wood v. Miller (Mass., 1905), 73 N. E. 849; Downing v. Elliott, 182 Mass. 28, 64 N. E. 201; Beckley v. Skroh, 19 Mo. App. 75; Duffy v. Meadows Co., 131 N. C. 31, 42 S. E. 460; Price v. Grantz, 118 Pa. 402, 11 Atl. 794, 4 Am. St. R. 601; Tiede v. Schneidt, 105 Wis. 470, 81 N. W. 826; Pennoyer v. Allen, 56 Wis. 510, 14 N. W. 609, 43 Am. Rep. 728. See, also, §§ 88, 137, 182, herein.

38. Cleveland v. Citizens' Gas Light Co., 20 N. J. Eq. 201.

39. Fay v. Whitman, 100 Mass. 76. As to slaughter houses see §§ 126-129, herein.

40. Burlington v. Stockwell, 5 Kan. App. 569, 47 Pac. 988; Wade v. Miller (Mass., 1905), 73 N. E. 849. See, also, §§ 93, 141, 183, herein.

41. Price v. Grantz, 118 Pa. 402, 11 Atl. 794, 4 Am. St. R. 601.

kept in a cleanly condition and in such a manner as not to injuriously affect the health of any normal person in the neighborhood.[42] It was said by the court in this case: "The defendant had a right to the lawful use and enjoyment of her premises, and this would include the keeping of hens in houses, and a yard used for that purpose, which are shown by the report to have been maintained in a cleanly condition, and cared for in such a manner as not to injuriously affect the health of any normal person living in the neighborhood. Although the odor arising from the hen houses and yard, which at times was accompanied by the characteristic cry made by their occupants, may have been unpleasant, it does not appear by the report to have been physically uncomfortable or unbearable. Indeed the findings of fact fail to show that the conditions existing on the premises of the defendant were abnormal, or differed substantially from those usually found in the country where the ordinary incidents arising from keeping barnyard fowls are not considered extraordinary or peculiarily irritating, even to sensitive persons."[43] And where a person seeks to enjoin the establishment of a business on the ground that it will be a nuisance because of the noxious smells that will be caused thereby, the fact that the neighborhood about to be affected is already devoted to noxious or disagreeable trades is held not to be sufficient to affect the right to an injunction unless the one complained of will not add sensibly to the discomfort. Nor is the right affected by the fact that some persons may sustain the annoyance without discomfort.[44]

§ 164. **That others contribute to injury no defense.**—A person is not relieved from liability for injury from noxious smells or gases proceeding from a cause for which he is responsible, by the fact that the complainant has sustained injuries from other causes.[45] But, where a person is liable for the damages occa-

42. Wade v. Miller (Mass. 1905), 73 N. E. 849.

43. Per Braley, J.

44. Cleveland v. Citizens' Gas L. Co., 20 N. J. Eq. 201, 206, per The Chancellor. See, also, Hurlbutt v. McKone, 55 Conn. 31, 10 Atl. 164, 3 Am. St. R. 17.

45. Frost v. Berkeley Phosphate Co., 42 S. C. 402, 20 S. E. 280, 46 Am. St. R. 736, 26 L. R. A. 693.

sioned by his own act, he is not liable for those caused by others and he may show that injury resulted from other causes than that complained of for the purpose of mitigating the damages.[46]

§ 165. **Effect of locality.**—The general rule that people who live in a city must submit to the annoyances incidental to city life, applies where smells or odors are complained of as nuisances.[47] In this class of cases also, what may by reason of density of population, residential character of the neighborhood, or the nature of the specific act, amount to a nuisance in one locality, may in another place and under different surroundings, be proper and unobjectionable.[48]

§ 166. **May be nuisance though not injurious to health.**—It is not necessary to entitle a complainant to the interference of a court for his protection that odors or gases should actually produce disease or be unwholesome. If they are offensive and disagreeable in such a manner as to render life uncomfortable, it is sufficient.[49] Nor is it necessary that an owner should be driven from his dwelling as a result thereof.[50] So a municipal corporation may be liable for a nuisance caused by noisome smells from an accumulation of garbage though such smells are not hurtful or unwholesome.[51] And a factory for manufacture of fish into a fertilizer, which produces noxious smells to the annoyance of persons traveling along the public road, has been held to be a common nuisance and indictable, though the smells are not injur-

46. Loughran v. City of Des Moines, 72 Iowa, 382, 34 N. W. 172.

47. Neuhs v. Grasselli Chemical Co., 5 Ohio N. P. 359, 8 Ohio Dec. 203. As to effect of locality see, also, §§ 95-98, 140, 184, herein.

48. Wade v. Miller (Mass., 1905), 73 N. E. 849.

49. Meigs v. Lister, 23 N. J. Eq. 199. See, also, Ashbrook v. Commonwealth, 1 Bush (Ky.), 139, 89 Am. Dec. 616; Cleveland v. Citizens Gas Light Co., 20 N. J. Eq. 201; Ross v. Butler, 19 N. J. Eq. 294; Davidson v. Isham, 9 N. J. Eq. 186; Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 33 N. Y. St. R. 246, 25 N. E. 246, 9 L. R. A. 711, affg. 45 Hun 257, 10 N. Y. St. R. 374; Pinckney v. Ewens, 4 L. T. (N. S.) 741. See, also, §§ 87, 129, 138, herein.

50. Bohan v. Port Jervis Gas Light Co., 122 N. Y. 18, 33 N. Y. St. R. 246, 25 N. E. 246, 9 L. R. A. 711, affg. 45 Hun, 257, 10 N. Y. St. R. 374.

51. Fort Worth v. Crawford, 74 Tex. 404, 12 S. W. 52.

ious to health, it being sufficient if they are offensive to the senses.[52]

§ 167. **Question of reasonable care immaterial.**—If one so uses his own premises as to cause injury to his neighbor by the emission of noxious smells or gases, he is liable therefor even though he may have used reasonable care,[53] or though the odors are such as are merely incident to a business which is conducted in a reasonable and proper manner.[54] The fact that most approved methods or appliances are used in conducting a business is no defense where it is carried on in such a manner as to interfere with the reasonable and comfortable enjoyment by another of his property or occasions material injury thereto.[55]

§ 168. **Though smells a public nuisance individual may sue.**—The rule that the fact that a nuisance is a public nuisance does not deprive an individual of his right of action where he has sustained a peculiar injury applies where the nuisance complained of consists of noxious smells.[56] Thus in a suit by an individual to abate a nuisance arising from noxious odors and gases caused by the refuse from a creamery which was allowed to accumulate in tanks, troughs and ditches and to stand so as to become putrid and sour and which were offensive to the senses and dangerous to the health of the plaintiff and his family, it was decided that the plaintiff might maintain his suit though the nuisance affected all the people in the neighborhood.[57]

§ 169. **Liability of municipal corporation.**—A municipal corporation is liable for a nuisance which it has power to remove or

52. State v. Luce, 9 Houst. (Del.) 396; citing State v. Wetherell, 5 Harr. (Del.) 487. As to fertilizer factories, see § 118, herein.

53. Frost v. Berkeley Phosphate Co., 42 S. C. 402, 20 S. E. 280, 26 L. R. A. 693, 46 Am. St. R. 736. See § 92, herein.

54. Price v. Oakfield Highland Creamery Co., 87 Wis. 536, 58 N. W. 1039, 24 L. R. A. 333; Pennoyer v. Allen, 56 Wis. 502, 14 N. W. 609, 43 Am. Rep. 728.

55. Duckstown Sulphur, Copper & I. Co. v. Barnes (Tenn., 1905), 60 S. W. 593.

56. Gavigan v. Atlantic Ref. Co., 186 Pa. 604, 40 Atl. 834.

57. Fisher v. Zumwalt, 128 Cal. 493, 61 Pac. 82.

where it permits a nuisance arising from the prosecution of a public work to remain.[58] So where a municipality allows a stream into which one of the city sewers empties to become obstructed, causing refuse to accumulate in the stream, emitting noxious smells and odors, it will be liable for the injury caused thereby since it is the duty of the city to remove the obstruction so as to allow the refuse to flow off without injury to the health of the inhabitants.[59]

§ 170. **Measure of damages.**—Where a nuisance is a permanent one, past, present and future, damages are recoverable in one action, but if it is temporary, only such damages are recoverable as have occurred to the time of bringing the action. Thus it was so held in an action by one to recover for injury from noxious smells caused by the placing by defendant of substances on his land, it being held that damages were only recoverable to the commencement of the suit and that successive actions could be maintained by the plaintiff until the nuisance was abated.[60] So in an action for injury to property caused by noxious smells from the dumping of garbage thereon it has been decided that a recovery cannot be had as for a permanent injury, it not appearing that the odors will be permanent or that there has been any permanent injury to the soil.[61] It was said by the court in this case: "The recovery of damages is sought in this case on the ground that the stenches and odors arising from the deposits of garbage and filth made by the city had rendered the dwelling of the plaintiff untenantable, thereby destroying its rental value, and causing permanent depreciation in the value of the property by reason of the odors and that reputation as to unhealthfulness acquired therefrom. It is not alleged that there was any permanent injury to the soil by reason of the deposits, but the claim for damages is made to rest upon the existence of the stench arising from the garbage. It follows that,

58. Fort Worth v. Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. R. 840. As to municipal liability in such cases see Chap. XIV., herein.

59. Jacksonville v. Dean, 145 Ill. 23, 33 N. E. 878.

60. Fairbanks Co. v. Bahre, 213 Ill. 636, 73 N. E. 322. See Cleveland C. C. & St. L. Ry. Co. v. King, 23 Ind. App. 573, 55 N. E. 875.

61. City of San Antonio v. Mackey's Estate, 22 Tex. Civ. App. 145, 54 S. W. 33.

unless the cause of the odors is of such a nature that it cannot be removed, there could be no permanent damage. There is no evidence that tends to prove that the odors are permanent in their injury. . . . There was no testimony to the effect that the nuisance could not be abated. . . . The testimony clearly established the temporary character of the nuisance, and, independent of the testimony, experience and reason would seem to teach that, in the very nature of things, deposits made on or near the surface can be removed. . . . Such being the case presented by the evidence, the depreciation in the market value of the land was not the measure of damages and the charge presenting that issue to the jury can have no other tendency than of misleading them. As to a nuisance capable of abatement, the depreciation of the value of the property can have no applicability. The settled rule of damages in such cases is the difference in the rental value with and without the nuisance."[62] In an action, however, by one for damages for a nuisance caused by the discharge by the defendant of refuse from his creamery onto plaintiff's lands and the noxious smells caused thereby, it was decided that the recovery was not limited to the damages to the land or the rental value thereof for the plaintiff might have sustained some special damages not capable of direct proof.[63] So in an action for damages for nuisance caused by unpleasant, disagreeable odors arising from water collecting about ties, placed by a railroad company in front of plaintiff's residence, which caused decay and decomposition, it was decided that as items of damages the plaintiffs were entitled to recover for loss of time and for all the discomforts in the home arising therefrom, such as vile odors, whether it caused mental or bodily pain or both; but that they could not recover for the unsightly appearance presented by the ties to the eye nor the marring of the charming vista in front of their home.[64] And where one sought to recover damages for injury

62. Per Fly, J., citing Jutte v. Hughes, 67 N. Y. 267; Ruff v. Rinaldo, 55 N. Y. 664; Francis v. Schoelkopf, 53 N. Y. 152; Comminge v. Stevenson, 76 Tex. 642, 13 S. W. 556; Fairbank Co. v. Nicolai, 167 Ill. 242, 47 N. E. 360; Gas Co. v. Thomas, 41 Neb. 662, 59 N. W. 925.

63. Van Fossen v. Clark, 113 Iowa, 86, 84 N. W. 989, 52 L. R. A. 279.

64. Houston, E. & W. T. Ry. Co.

caused by noxious smells and gases from a smelting works, it was decided that his entire damages were recoverable without regard to the fact that the establishment of such works afforded a market for the timber and garden products from his land.[65] But where sewage disposal works maintained by the defendant constituted a nuisance to the plaintiff and his premises, the measure of damages was held to be the difference between the rental value of the property prior to the erection and maintenance of the disposal works and its value after such works were erected, there being no evidence of, and plaintiff not seeking any damages from physical discomfort, annoyance, inconvenience or sickness arising from the odors complained of.[66] If the nuisance complained of is a public nuisance, a plaintiff can only recover damages for such injuries as are not common to the public.[67]

§ 171. **Act authorizing board of health to abate public nuisances construed.**—Under an act authorizing boards of health to abate nuisances hazardous to public health, a nuisance which may be abated by such a board under this act must be one which is in fact hazardous to public health. If it merely causes annoyance, renders a home uncomfortable or depreciates the value of property, relief must be sought by the individual. A nuisance is within the meaning of such an act where it consists of smells which are so offensive that citizens are obliged to retire within their houses and close their doors and windows and are of such a character that they produce nausea and vomiting and frequently compel people to go without their meals.[68]

§ 172. **Injunction order—How construed.**—An injunction order should be clear and definite in its terms so that the party en-

v. Reasonover (Tex. Civ. App., 1904), 81 S. W. 329.

65. Ducktown Sulphur, Copper & I. Co. v. Barnes (Tenn., 1900), 60 S. W. 593.

66. Gerow v. Village of Liberty (N. Y. App. Div., 1905), 94 N. Y. Supp. 949.

67. Fort Worth v. Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. R. 840. As to necessity of special injury to enable individual to sue for nuisance affecting the highway see §§ 218-222, herein.

68. State, Board of Health v. Neidt, (N. J.) , 19 Atl. 318 (construing N. J. Pub. L. 1887, p. 80).

joined may readily know what he can or cannot do thereunder and should be so construed as not to do violence to the language and intent of the order. Thus it was so declared where an injunction had been granted against the mixing of acids or chemicals in the making of phosphate manures so as to produce noxious smells creating a nuisance, it being held that the order only referred to the manufacture of such manures and did not apply to the making of fish oil in the same factory, it appearing from the finding on which the injunction was based that this business was not a nuisance.[69]

§ 173. **Where evidence conflicting—In case of appeal.**—The appellate court in reviewing the determination of a trial court on a question of fact as to whether the use of premises, causing smells, is a nuisance when the evidence is conflicting, will not reverse the determination of the former merely upon the ground that in its opinion a different conclusion should have been reached.[70]

69. Baldwin v. Miles, 58 Coun. 496, 20 Atl. 618.

70. Mackay-Smith v. Crawford, 56 App. Div. (N. Y.) 136, 67 N. Y. Supp. 541, affd. 171 N. Y. 662, 64 N. E. 1123.

CHAPTER X.

Noises, Jars and Vibrations.

Section 174. Noise as a nuisance.—Generally.
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184. Effect of locality.
185. Where business legalized.
186. Same subject.—Location not designated.
187. Where nuisance can be avoided.
188. Jars and vibrations.
189. Distinction between nuisance affecting air and those affecting land or structures.
190. Jar and vibration.—Defendant may show injury due to other causes.
191. Damages recoverable.

§ 174. **Noise as a nuisance—Generally.**—Noise which constitutes an annoyance to a person of ordinary sensibility to sound, so as to materially interfere with the ordinary comfort of life and to impair the reasonable enjoyment of his habitation to him, is a nuisance.[1] "If unusual and disturbing noises are made, and

1. Roth v. Couly (Ky., 1900), 55 S. W. 881; Froelicher v. Oswald Ironworks, 111 La. 705, 35 So. 821, 64 L. R. A. 228; State v. King, 105 La. 731, 30 So. 101; Dittman v. Repp, 50 Md. 516, 33 Am. Rep. 525; Davis v. Sawyer, 133 Mass. 89, 43 Am. Rep. 519; Davidson v. Isham, 9 N. J. Eq. 186; Pritchard v. Edison Electric Illum. Co., 179 N. Y. 364, 72 N. E. 243, aff'g 92 App. Div. 178, 87 N. Y. Supp. 225; Shaw v. Queen City Forging Co., 7 Ohio N. P. 254, 10 Ohio S. & C. P. Dec. 107; Schlueter v. Billingheimer (Ohio), 14 Wkly. Law Bull. 224; Sparhawk v. Union Pass. Ry. Co., 54 Pa. 401; Stockdale v. Rio Grande Western Ry. Co. (Utah, 1904), 77 Pac. 849; Powell v. Bentley & G. Furn. Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53; Snyder v. Cabell, 29 W. Va. 48, 1

particularly if they are regularly and persistently made, and if they are of a character to affect the comfort of a man's household, or the peace and health of his family, and to destroy the comfortable enjoyment of his home, a court of equity will stretch out its strong arm to prevent the continuance of such injurious acts."[2] And to render noise a nuisance it need not be such as to injure health.[3] A preliminary injunction may, however, be refused where it appears that it will work irreparable injury. So it was refused in an action by one to restrain the removal of theatrical scenery from a theatre on Sunday mornings at the expiration of the weekly engagements of the companies playing there, it being claimed that a nuisance was thereby created on account of the noise which deprived residents of their sleep.[4]

§ 175. Noises at unreasonable hours.—The carrying on of a business at unreasonable hours which produces noise to the annoyance and substantial discomfort of residents in the neighborhood, will constitute a nuisance which a court of equity will restrain.[5] So where a factory located in a residence district is operated both day and night and produces such noises as to deprive persons in the neighborhood of their needed rest and sleep, the operation of the factory during the unreasonable hours will be restrained.[6] So where a person who was a sheet and iron worker commenced to carry on his work generally before daylight, discontinued it during the day while he worked elsewhere and resumed it in the evening and continued it until eleven o'clock at night and the noise of the hammering was very great so that the complainant and his family could scarcely hear each other converse, were obliged to

S. E. 241; Heather v. Pardou, 37 L. T. N. S. 393; Broder v. Saillard L. R. 2 Ch. Div. 692. See Metropolitan West Side Elev. R. Co., 100 Ill. App. 323.

2. Appeal of Ladies' Decorative Art Club (Pa., 1888), 13 Atl. 537, per the court.

3. Froelicher v. Oswold Ironworks, 111 La. 705, 35 So. 821, 64 L. R. A. 228. See, also, §§ 87, 129, 138, 166, herein.

4. Penrose v. Nixon, 140 Pa. 45, 21 Atl. 364.

5. Dennis v. Eckhardt, 3 Grant Cas. (Pa.) 390; McCann v. Strang, 97 Wis. 551, 72 N. W. 1117; Rushmer v. Rolsue & Alfieri (1906), 1 Ch. 234.

6. Shaw v. Queen City Forging Co., 7 Ohio N. P. 254, 10 Ohio S. & C. P. Dec. 107.

abandon their chambers next to the shop, and every night and morning were deprived of their rest by the persistent hammering, it was decided that a preliminary injunction should be granted.[7] In this case the court said: "I cannot doubt that a constant annoyance, which at law cannot be abated, is never remedied by damages. The loss of health and sleep, the enjoyment of quiet and repose, and the comforts of home cannot be restored or compensated in money; it may afford consolation, but it does not remedy the evil if that goes on, to be paid for by installments. The law operates on the past only, while equity can and will act on the present and future, will abate the nuisance itself, and restore the injured party to his rights. In this case a suit or suits would not be an adequate remedy for the evils complained of, in my opinion. But we should not interfere by preliminary injunction, except in cases of irreparable mischief or injury. Have we not such a case here? It may be asked if the mischief is not irreparable which entails the want of health as a consequence of annoyances. A chancellor does not wait until noisome trades and unwholesome gases kill somebody before he proceeds to restrain. . . His remedy is preventive, and if the tendency of the acts complained of be injurious, so that the injury be irreparable, he will proceed to prevent them. . . . I am therefore of the opinion that the defendant should be restrained from using his tin and sheet iron workshop, as a workshop, until further order of the court."[8] Again the making of great noises in the night with a speaking trumpet to the disturbance of the neighborhood has been held to be a nuisance and the defendant fined.[9]

§ 176. **Particular noises as a nuisance.**—Where a school of decorative art was established in a neighborhood used for dwellings and the noises from instruction in metal chasing produced loud noises which interfered with conversation and substantially affected the residents in the comforts and enjoyment of their homes, it was held to constitute a nuisance.[10] So noises from the business of a gold and silver beater have been held to be a nuis-

7. Dennis v. Eckhardt, 3 Grant Cas. (Pa.) 390.
8. Per Thomspon, J.
9. Rex v. Smith, 1 Strange, 704.
10. Ladies' Decorative Art Club's Appeal (Pa., 1888), 13 Atl. 537.

ance,[11] from a skating rink,[12] a roller coaster,[13] and an adjoining owner has been held entitled to an injunction restraining the defendant from keeping horses in his stable so as to cause noise so great as to prevent the ordinary and comfortable use and enjoyment by a tenant of plaintiff's house.[14] So where a circus caused noises near plaintiff's dwelling to such an extent as to materially interfere with the ordinary comfort by the plaintiff of his home, the continuance of the same was enjoined.[15] So in an action to restrain an electric light company from so operating its plant as to cause a nuisance by the noise and vibration to the lessee of adjoining premises, used as a dwelling, it was decided that there "must be an injunction during the continuance of plaintiff's lease to restrain the defendant company, its servants, directors, and agents, from using or working or causing or permitting to be used or worked, in or upon their generating station and other works adjacent to the plaintiff's garden, any engines, dynamos, or other machinery, or for the carrying on the manufacture of gas or any other process, in such manner as, by the production of noise, noxious or offensive smells, vibration or otherwise to be or occasion nuisance or injury to the plaintiff as lessee or occupier of the house, garden, and premises comprised in her lease.[16] So the noise from a steam engine may, under some circumstances, be a nuisance and the use of the engine on that account restrained.[17] And one may be enjoined from producing noises or sounds where he acts maliciously for the purpose of annoying his neighbor.[18] But noises or sounds caused by music lessons several hours a week in an adjoining house separated from the plaintiff's by a party wall, and also the sounds caused by some one practicing on a piano and violin; from musical parties, and from musical per-

11. Wallace v. Auer, 10 Phila. (Pa.) 356.

12. Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241.

13. Schleuter v. Billingheimer (Ohio C. P.), 14 Wkly. Law B. 224.

14. Broder v. Saillard, L. R. 2 Ch. Div. 692. As to stables, see §§ 200-204, herein.

15. Inchbold v. Robinson, 20 L. T. N. S. 259.

16. Knight v. Isle of Wight Elec. L. & P. Co., 73 L. J. Ch. 299, 90 Law T. (N. S.) 410, 68 J. P. 266, per Joyce, J. As to electric light plants, see § 114, herein.

17. Davidson v. Isham, 9 N. J. Eq. 186.

18. Christie v. Davey (1893), 1 Ch. 316.

formances for the entertainment of persons living in the house were held not to constitute a nuisance.[19] And where defendant was constructing new buildings into which it intended to remove its electric light plant, it was decided, in an action by an adjoining owner to enjoin the business on account of noise and jar from the machinery, that, while an injunction should be granted, yet, in view of the contemplated change of location, the defendant should be given time to remove the plant before the judgment should take effect.[20] And where residents in the neighborhood of a factory sought by injunction to abate noises therefrom and it was admitted by the plaintiff that the defendant had up to a certain time conducted its business within a proper exercise of its rights and that the injury complained of was owing to the fact that they had subsequently acted in excess thereof, it was held that an injunction should only be granted to the extent of the nuisance alleged.[21]

§ 177. **Noise disturbing religious services—Action by individual.**—Though an individual may be annoyed or interrupted in his religious devotion or exercises by noise yet it has been decided that he will not, on this ground alone, be entitled to an injunction to restrain such noise or the cause thereof as a nuisance. So in an action by a member of a religious organization to abate noises which disturbed him in his religious exercises, it was decided that the injury complained of being in the nature of a nuisance or injury to the officers of the church, it was for them to seek redress therefor and not for the plaintiff.[22] It was said by the court in this case: "In the first place, the injury alleged is not the ground of an action. He (the plaintiff) claims no right in the building, or any pew in it, which has been invaded. There is no damage to his property, health, reputation or person. He is disturbed in listening to a sermon by noises. Could an action be brought by every person whose mind or feelings were disturbed in listen-

19. Christie v. Davey (1893), 1 Ch. 316.

20. Braender v. Harlem Lighting Co., 2 N. Y. Supp. 245.

21. Shaw v. Queen City Forging Co., 7 Ohio N. P. 254, 10 Ohio S. & C. P. Dec. 117.

22. Owen v. Henman, 1 Watts & S. (Pa.) 548, 37 Am. Dec. 481.

ing to a discourse, or any other mental exercise (and it must be the same whether in church or elsewhere) by the noises voluntary or involuntary, of others, the field of litigation would be extended beyond endurance. The injury, however, is not of a temporal nature; it is altogether of a spiritual character for which no action lies."[23] And it has been decided that an injunction will not be granted in such a case though the act be illegal. Thus it was so held in Sparhawk v. Union Passenger Railway Co.,[24] in which the court said: "The proofs exhibited by the plaintiffs are like the bill, and show only the public offense, we think. It is in substance that on the Sabbath day, devotional exercises such as reading the scriptures, engaging in public or private worship, and giving religious instruction to children, are disturbed, especially in front parts of

23. Per Sergeant, J.

So it was said in another case in this State: "Religious meditation, and devotional services, are a duty and a privilege undoubtedly, but result nevertheless from sentiments not universal in their demonstration by any means, but peculiar to individuals rather than to the whole community. . . . It cannot be affirmed in regard to the devotional exercises embraced within the privilege, that it is more than a mental disturbance—an inconvenience. . . . It seems to me that the rule expressed in the cases referred to is the only true one in judging of injury from alleged nuisances, viz., such as naturally and necessarily result to all alike who come within their influence. Not to one on account of peculiar sentiments, feelings or tastes, if it would have no effect on another, or all others without these peculiar sentiments or tastes. Not to a sectarian if it would not be to one belonging to no church. It must be something about the effects of which all agree. . . . The bill charges an injury not physical, but mental or spiritual. One which neither deprives the body of rest, refreshment or health. That this is the nature of the complaint is most evident, from the fact that the disturbing causes are the same, and no greater, on Sundays than on other days, and of this there is no complaint. How are we to determine whether the mind is injuriously disturbed or not? To some it is granted that there may be annoyance in the passing of cars on Sundays. To others it would be but an agreeable sound. To many it would be an annoyance because of their views of the Sabbath. . . . It is not possible in my judgment to establish a material injury, where alone at most the mind is disturbed without the slightest bodily effect or interference with ordinary comfort. It is but an inconvenience incident to the situation, and not the subject of an adjudication in equity." Per Thompson, J., in Sparhawk v. Union Pass. Ry. Co., 54 Pa. St. 401.

24. 54 Pa. St. 401.

their dwellings, and that the enjoyment of their pews in the churches along the line of the defendants' road is interfered with, because of an inability, on account of the noise incident to the cars at the moment of passing, of distinctly hearing what the minister is saying or reading; and also because it is difficult, as proved by one witness at least, a respectable clergyman, to make himself heard by the congregation, and for these reasons the property of the complainants is claimed to be injured and rendered less valuable. If this be taken as the uncontradicted testimony, which is far from being the case, does it do more than establish the offense of a violation of the statute, and therefore is injurious because done on the Sabbath? . . . Separated from the offense against the day there is no complaint of injury—associated with it there is an injury according to the plaintiff. Is it not certain, therefore, that it is because of a violation of the Sunday law, that it is an injury? For this there is a remedy in the penal laws, and not by proceedings in equity, if we regard the facts as we ought to. It is not impossible to construct a plausible argument on the theory that any violation of a penal law is, without more, a special injury; but such an injury would be too shadowy to be the foundation for equitable interference; and, besides, the penal law is the remedy in such a case to redress it, and equity does not interfere."[25] And though a person may be a pew holder in the church affected, it is decided that he has no right to proceed in his own name to enjoin a nuisance against the church to which he belongs.[26]

§ 178. **Same subject—In action by religious corporation or society.**—Though from the cases considered in the preceding section it will be seen that noise has been held not to be a nuisance which may be restrained in a suit in equity merely because people are thereby disturbed in their religious exercises or devotions either at home or in a church, yet it will be observed that these cases have been actions or proceedings by an individual or individuals and not by religious society itself. It would probably

25. Per Thompson, J.

26. Sparhawk v. Union Pass. Ry. Co., 54 Pa. St. 401. See, also, Trustees of First Baptist Church v. Utica & S. Ry. Co., 6 Barb. (N. Y.) 313.

be determined that if the noises were of such a character as to render the church useless for the purposes for which designed or materially depreciated the value of the property, then an action would lie in behalf of the corporation for damages and that where the nuisance is a continuous one it might be restrained. In this connection a decision in the United States Supreme Court is pertinent though the nuisance consisted of other elements than noise. It here appeared that the defendant, a railroad company, had constructed its engine house and machine shops on land immediately adjoining the church edifice of the plaintiff, a religious society. The nuisance complained of consisted of noises caused by the hammering in the shop, the rumbling of engines passing in and out of the engine house, the blowing off of steam, the ringing of bells, the sounding of whistles, and also of smoke from the chimneys together with cinders, dust, and offensive odors. The noise was often so great as to prevent the voice of the pastor while preaching from being heard. The smoke and cinders often entered the church in such quantities as to cover the seats of the church with soot and to soil the garments of the worshippers. The odors, in addition to the noise and smoke, rendered the place not only uncomfortable but almost unendurable as a place of worship. It was decided by the court in this case that the engine house and repair shop as used, were plainly a nuisance and that there might be a recovery by the plaintiff for the injuries done to its property and for the personal discomfort and apprehension of danger suffered by its members. Mr. Justice Field said in this case: "The right of the plaintiff to recover for the annoyance and discomfort to its members in the use of its property, and the liability of the defendant to respond in damages for causing them, are not affected by their corporate character. Private corporations are but associations of individuals united for some common purpose, and permitted by the law to use a common name, and to change its members without a dissolution of the association. Whatever interferes with the comfortable use of their property, for the purposes of their formation, is as much the subject of complaint as though the members were united by some other than a corporate tie. Here the plaintiff, the Fifth Baptist Church, was incorporated that it might hold and use an edifice erected by it, as a place of public

worship for its members and those of similar faith meeting with them. Whatever prevents the comfortable use of the property for that purpose by the members of the corporation, or those who, by its permission, unite with them in the church, is a disturbance and annoyance, as much so as if access by them to the church was impeded and rendered inconvenient and difficult. The purpose of the organization is thus thwarted. It is sufficient to maintain the action to show that the building of the plaintiff was thus rendered less valuable for the purposes to which it was devoted.[27] So in an action by a church society to restrain the playing of a band in a skating rink, which was on adjoining premises, in such a manner as to disturb services in the church on week days, it was decided that the injunction would be granted as the use of the premises by the complainant for religious exercises was a natural and ordinary one in which it should be protected, and that the annoyance complained of materially interfered with such use.[28]

§ 179. **Ringing of bells.**—The habitual ringing of a bell may constitute a nuisance which will be enjoined as in the case of a heavy factory bell which is rung at an early hour in the morning in order to rouse the operatives and which disturbs the sleep of residents in the neighborhood. And evidence of a custom to ring bells in other places for such a purpose is held inadmissible.[29] And it has been decided that where the ringing of church bells causes a substantial annoyance and injury to the occupants of adjoining premises it may be enjoined.[30] But the question whether the ringing of bells constitutes a nuisance is to be determined by the effect upon ordinary persons. So the ringing of church bells in a thickly populated locality was held not to be a nuisance merely from the fact that it caused annoyance to a person who was pecu-

27. Baltimore & Potomac R. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 329, 27 L. Ed. 739. See, also, Chicago G. W. Ry. Co. v. First Methodist Episcopal Church, 102 Fed. 85, 42 C. C. A. 178, 50 L. R. A. 488, so holding under very similar facts.

28. Church of St. Margaret v. Stephens, 29 Ont. Rep. 185. Compare, however, Trustees of First Baptist Church v. Utica & S. Ry. Co., 6 Barb. (N. Y.) 313.

29. Davis v. Sawyer, 133 Mass. 289, 43 Am. Rep. 519.

30. Harrison v. St. Mark's Church, 12 Phila. (Pa.) 259; Soltau v. De Held, 2 Simons N. S. 133.

liarly susceptible to noise on account of a sunstroke which he had sustained.[31]

§ 180. **Steam whistles.**—The blowing of whistles at factories to regulate and direct the order of work may be necessary to the proper conduct of business and is not a nuisance *per se*. The noises and sounds, however, which these whistles are capable of making may become a nuisance where they cause an injury to health or operate to destroy the comfort of one's home, and in such a case the protecting arm of the law may be invoked to prevent them.[32] Upon the question of a nuisance caused by the blowing of a factory whistle, it is said in a late case: "The blowing of whistles at factories to regulate and direct the order of work may be necessary to the proper conduct of business, certainly it is not a nuisance *per se*. Such sounds and noises as these whistles are capable of making can become nuisance, however, and the protecting arm of the law can be invoked to prevent such. Injury to health and destruction of the comforts of one's home can be accomplished by frightful noises just as well as by means of noxious and offensive odors." [33] In the application of the rule that a person has no right to do on his premises that which detracts from the safety of travelers or renders the highway disagreeable it has been determined a person has no right to maintain and operate a steam whistle of such a character as to frighten horses of ordinary gentleness when passing upon the highway adjoining his land.[34] So where by the blowing of a factory whistle plaintiff's horse became frightened and plaintiff was injured, the proprietor of the factory was held liable.[35] And in such a case the one maintaining the whistle has been held liable though the person injured was

31. Rogers v. Elliott, 146 Mass. 349, 15 N. E. 768, 4 Am. St. R. 316.

32. Redd v. Edna Cotton Mills, 136 N. C. 342, 48 S. E. 761, 67 L. R. A. 983.

33. Redd v. Cotton Mills, 136 N. C. 342, 343, 48 S. E. 761, 67 L. R. A. 983, per Montgomery, J.

34. Knight v. Goodyear's India Rubber G. M. Co., 38 Conn. 438, 9 Am. Rep. 406; Albee v. Chappaqua Shoe Mfg. Co., 62 Hun (N. Y.), 223, 42 N. Y. St. R. 566, 16 N. Y. Supp. 687. As to objects in highway which may frighten horses, see § 255, herein.

35. Knight v. Goodyear's India Rubber G. M. Co., 38 Conn. 438, 9 Am. Rep. 406.

guilty of negligence.[36] Again, where the blowing of a whistle is unnecessary to the successful prosecution of a business and causes great annoyance to others in the neighborhood, it has been decided that it may be enjoined as a nuisance.[37] So in another case it was decided that the court erred in refusing to grant an injunction where it was shown that the whistle was unnecessary, was blown at unreasonable hours, and seriously interfered with the reasonable enjoyment by the plaintiffs of their habitations on account of the loud, harsh, and terrific noise.[38] But where power is conferred by statute upon a municipality to abate public nuisances, it is not thereby authorized to prohibit an act which is not a public nuisance and it has been decided that in such a case it has no power to prohibit by ordinance the use of steam whistles within the municipal limits.[39] In an action to enjoin the blowing of a factory whistle, on the ground that it is a nuisance, if the court is not satisfied under all the evidence that the blowing of the whistle is a nuisance it will not interfere until the fact of "nuisance" has been established by law.[40]

§ 181. **Anticipated nuisance—Erection of building.**—The erection of a building to be used for a certain business will not be restrained on the ground of anticipated noise therefrom where it is not necessarily a nuisance, but may become one under some circumstances. The anticipated injury being contingent and possible only the court will refrain from interfering.[41]

36. Albee v. Chappaqua Shoe Mfg. Co., 62 Hun (N. Y.), 223, 42 N. Y. St. R. 566, 16 N. Y. Supp. 687.

37. Butterfield v. Klaber, 52 How. Pr. (N. Y.) 255.

38. Hill v. McBurney Oil & Fertilizer Co., 112 Ga. 788, 38 S. E. 42, 52 L. R. A. 398.

39. Whitcomb v. City of Springfield, 2 Ohio C. D. 138.

40. Redd v. Edna Cotton Mills, 136 N. C. 342, 28 S. E. 761, 67 L. R. A. 983.

41. Dorsey v. Allen, 85 N. C. 358, 39 Am. Rep. 704, in which it was said by the court: "It would be an unwise exercise of power, upon such uncertainty as to the practical working of an undertakened enterprise, and its consequent effects, for the court to interfere and prevent it being carried out." As to injunction to restrain erection of a building, see §§ 103, 205, herein.

§ 182. Noise must produce substantial injury.—Trifling or occasional noises dependent on ordinary use of property or in pursuance of an ordinary trade or calling will not constitute a nuisance.[42] The noise must be such as materially to interfere with and impair the ordinary comfort of existence on the part of ordinary people.[43] The injury must be a substantial one. "A merely sentimental disturbance is not an element of injury for which recovery can be had. A railroad may disturb an aesthetic sensibility, and thus impair the enjoyment which occupants of private property and the public generally, formerly had, and still not impair any legal right nor give ground for recovery of damages, although such disturbance may have some effect in depreciating the market value of private property. It must appear that there has been an injury, direct and physical, or 'really peculiar' to the right of user and enjoyment."[44] So where, in an action to enjoin a marble cutting and polishing works adjoining plaintiff's building, as a nuisance, it appeared that conversation in ordinary tones could be carried on in the room where the machinery was; that the noises were not audible on the street in which the works were situated; and that they could scarcely be heard in nearby private residences, it was decided that the evidence did not show a substantial injury therefrom.[45] And in another case the court refused to grant an injunction restraining the operation of a steam laundry on the second floor of a building on the ground of annoyance by noise and vibration to the occupants of the first floor where it did not appear that the occupants of the latter floor were injured in their business or that there was an injury to their health or that of their employees.[46]

42. McGuire v. Bloomingdale, 33 Misc. R. (N. Y.) 337, 68 N. Y. Supp. 477. See, also, §§ 88, 137, 162, herein.

43. Yocum v. Hotel St. George Co., 18 Abb. N. C. (N. Y.) 340; Shaw v. Queen City Forging Co., 7 Ohio N. P. 254, 10 Ohio S. & C. P. Dec. 107; Appeal of McCaffrey, 105 Pa. 253; Powell v. Bentley & G. Furn. Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53. See Scott v. Houpt, 8 Kulp (Pa.), 42, holding that to render a noise produced by the carrying on of a business a nuisance *per se* there must be an absolute invasion of the rights of those affected by the noise.

44. Metropolitan West Side Elev. R. Co. v. Goll, 100 Ill. App. 323, per Freeman, J.

45. Butterfield v. Klaber, 52 How. Pr. (N. Y.) 255.

46. Miller v. Schindle, 15 Pa. Co.

§ 183. **The test is the effect upon ordinary persons.**—The test as to whether noise constitutes a nuisance is not the effect upon one particular person without regard to his mental or physical condition, but rather the effect upon the average person of ordinary sensibilities.[47] The noise must be such as would be likely to cause some actual, material, physical discomfort to a person of ordinary sensibilities.[48] So it is declared by the court in a Pennsylvania case: "If the noise is only slight, and the inconvenience merely fanciful, or such as would only be complained of by people of elegant and dainty modes of living and inflicts no serious or substantial discomfort, a court of equity will not take cognizance of it."[49] And in another case it is said: "People who have extraordinary sensibilities or nervous temperaments, the sick, the afflicted, they whose refined tastes, habits and inclinations lead them to prefer complete silence and exclusion, are not to be selected as best qualified to attest or determine the precise limits of mutual forbearance, or the absolute essentials of comfortable enjoyment."[50] So in a case in the Federal Courts the court refused to grant an injunction restraining the defendant from necessary drilling and blasting on his lot for the purpose of erecting a house where the work was being done in a careful and proper manner and it appeared that the plaintiff complained on the ground that by reason of his enfeebled condition from a disease and an operation, the noise and jar would have an injurious effect on him.[51] It was said by the court in this case: "The court has been able to

Ct. R. 341. As to laundries, see § 122, herein.

47. Lord v. De Witt, 116 Fed. 713; McGuire v. Bloomingdale, 33 Misc. R. (N. Y.) 337, 68 N. Y. Supp. 477; Shaw v. Queen City Forging Co., 7 Ohio N. P. 254, 10 Ohio S. & C. P. Dec. 107.

So in an action for a nuisance caused by noise it was said by the court: "There is a test in matter of nuisance which the following question suggests: Is the discomfort one of mere fastidiousness or extreme refinement, as is sometimes seen, or does the nuisance interrupt the average comfort to which the individual has the right." Per Breaux, J., in Froelicher v. Oswald Ironworks, 111 La. 705, 708, 35 So. 821, 64 L. R. A. 228.

48. McCann v. Strang, 97 Wis. 551, 72 N. W. 1117.

49. Appeal of Ladies' Decorative Art Club (Pa., 1888), 13 Atl. 537, per the court.

50. Butterfield v. Klaber, 52 How. Prac. (N. Y.) 255, per Sandford, J.

51. Lord v. De Witt, 116 Fed. 713.

find no authority for the proposition that the owner of real estate must desist from the usual and ordinary method of its improvement, because his neighbor may happen to be thus afflicted, or on any theory that to continue the excavation would be a private nuisance subject to the control of the courts. However shocking it may sound to assert that A is going to take such and such action, the result of which will be to kill B, a court of equity cannot interfere to prevent his doing so merely because such conduct would shock the conscience. Plaintiff has mistaken his forum. The only real basis for his contention is common humanity, and to defendant's humanity, not to legal tribunals, his appeal, or rather the appeal of those who have brought this suit for him, should be made."[52]

§ 184. **Effect of locality.**—The general rules as to effect of locality in determining what constitutes a nuisance applies in the case of noises.[53] What may be a nuisance in one locality may not in another.[54] Noises may be a nuisance in a populous city which would not be in the country.[55] "A person who resides in the center of a large city must not expect to be surrounded by the stillness which prevails in a rural district. He must necessarily hear some of the noise, and occasionally feel slight vibrations, produced by the movement and labor of its people, and by the hum of its mechanical industries. The aid of a court of equity may be invoked to keep annoying sounds within reasonable limits. Every noise, however, is not a nuisance, nor, when produced by the exercise of a lawful occupation, should the strong arm of a chancellor necessarily be extended to suppress it."[56] So where the noises

52. Per Lacombe, C. J.

53. See §§ 95, 98, 140, 165, herein.

54. Sturges v. Bridgman, L. R. 11 Ch. Div. 852.

In a recent case in England it is decided that if, in a locality devoted to noisy trades, such as the printing and allied trades, a printing house or factory subjects the occupier of an adjoining residence to such an increase of noise as to interfere substantially with the ordinary comfort of human existence according to the standard of comfort prevailing in that locality, this is sufficient to constitute an actionable wrong, entitling that occupier to an injunction. Rushmer v. Polsue & Alfieri (1906), 1 Ch. 234.

55. McKeon v. See, 4 Rob. (N. Y.) 449; Dallas v. Ladies' Decorative Art Club, 4 Pa. Co. Ct. R. 340.

56. McCaffrey's Appeal, 105 Pa. St. 25, per Mercur, C. J.

complained of were necessarily and inseparably incident to the conduct of a business which was lawful and was located in a part of the city which was devoted exclusively to manufacturing, an injunction was refused.[57] And where coal elevators and towers, such as are ordinarily used in large seaport towns for loading and discharging cargoes, were erected in accordance with directions from the harbor authorities and caused no more noise than was ordinarily incident thereto, it was decided that one who owned a residence in the section of the city where they were located and which by the growth of the city had become the manufacturing and business centre, could not recover damages on account of such noise.[58] And where a business was located in a portion of a city occupied to some extent by business enterprises and partly by dwellings it was decided that noises ordinarily incidental to the business and operation of the machinery which were never deafening, and did not disturb repose, or materially interfere with the comfort of ordinary people, did not constitute a nuisance.[59]

§ 185. **Where business legalized.**—The fact that the carrying on of a business or enterprise which produces noises has been legalized will in many cases prevent it from being regarded in law as a nuisance which may be enjoined though it would be so considered in the absence of such authorization.[60] So where a company was authorized by law to construct, maintain, and operate a railroad it was decided that the use by it of its main tracks in preparing trains for departure, thus causing noises and vibration would not be restrained as a nuisance in the absence of any abuse of the privilege or franchise granted by law.[61] And in an action to enjoin the maintenance and operation of railroad shops on account of the noise therefrom it was decided that, as the railroad was authorized to build its line, construct its shops, and acquire property for such purpose, the injunction would not be granted, but

57. Strauss v. Barnett, 140 Pa. 111, 21 Atl. 253.

58. Robins v. Dominion Coal Co., 16 Rap. Jud. Queb. C. S. 195.

59. Butterfield v. Klaber, 52 How. Pr. (N. Y.) 255.

60. See Chap. VI, herein.

61. Beideman v. Railroad Co. (N. J. Ch.), 19 Atl. 731.

that the plaintiff would be left to his action for damages.[62] But where the law under which an electric lighting company was organized provided that it should not be exempt from any proceedings for any nuisance created by it, it was decided that it would be enjoined from causing annoyance and discomfort to the occupants of adjoining premises by the noise and vibrations in making excavations for its foundations, though it had exercised due care and skill to avert a nuisance.[63]

§ 186. **Same subject—Location not designated.**—In a case in Minnesota a distinction has been made between the location of a car barn in a city by a street railway company and that of a round house by a railroad company. It was here decided that where a street railway company was authorized by city ordinances to lay its tracks and operate its system in a city, the location by it of car barns in a built-up portion of the city which caused loud and disagreeable noises in the switching of the cars was not improper or unreasonable, and the company not being guilty of any negligence, the barns did not constitute a private nuisance.[64] The court said in this case. "There is a radical difference between an ordinary commercial railway, operated by steam, and a surface street railway, operated by electricity, as to the selection of its round houses and machine shops by the one, and its car barns by the other. In each case the selection must be made with reference to the rights of property owners in the neighborhood; also, those of the railway company and of the public. The rights and conveniences of property owners cannot alone be considered, for one living in a city must necessarily submit to the annoyances which are incidental to urban life, and individual comfort must in many cases yield to the public good. Now, the only ground for claiming in this case that the location of the defendant's car barn was an improper one is that it is in the residence portion of the city. But the exclusive

62. Rainey v. Red River T. & S. Ry. Co. (Tex. Civ. App., 1904), 80 S. W. 95.

63. Shelfer v. London Electric Lighting Co. (C. A.), (1895) 1 Ch. 287, 64 L. J. Ch. (N. S.) 216.

64. Romer v. St. Paul City R. Co., 75 Minn. 211, 77 N. W. 825, distinguishing Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. Ed. 739. See, also, 76, herein.

business of the defendant is the carrying of passengers within the limits of the city and in its streets. Its lines transverse the streets of the residence portion of the city. Its business is there. It takes on and discharges passengers in all parts of the city. It must have its car barns so located that it can promptly get its cars upon its lines for the purpose of enabling the people of the city to seasonably get from their homes to their respective places of business or labor. It cannot locate its barns outside of the city, because it is only authorized to build and operate its lines within the city limits and upon its streets; and, if it had the authority to do otherwise, it would be impracticable and detrimental to public interests to do so. Again, if it locates its barns at points where there are at present no dwelling houses, it is only a matter of time when some property owner will be disturbed by the loud and disagreeable noises necessarily occasioned by taking its cars in and out of the barns. The rights of such owner are the same as those of the plaintiff. The barn in question is only one of five barns located and used by the defendant for the same purpose in different parts of the city, and the evidence conclusively shows that its location is not an improper or unreasonable one."[65]

§ 187. **Where nuisance can be avoided.**—If the noises or vibrations constituting the nuisance can be avoided by the aid of science and skill, equity will not enjoin the carrying on of a business or enterprise which is the cause of such noises or vibrations, but will require those things to be done which can be done to avoid the injurious consequences.[66] Thus, it was so held in the case of noises caused by a corn and flouring mill.[67] And where a noise or jar from machinery can be avoided by moving the machinery a decree requiring this to be done will be given.[68] And where the noise and jar complained of results from a defect in the machinery remedied.[69] So where the noise complained of is produced by an the operation of the machinery may be enjoined until the defect is

65. Per Start, C. J.

66. Green v. Lake, 54 Miss. 540, 27 Am. Rep. 378.

67. Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378.

68. Demarest v. Hardham, 34 N. J. Eq. 469; Pach v. Geoffroy, 67 Hun (N. Y.), 401, 51 N. Y. St. R. 777, 22 N. Y. Supp. 275.

69. Yocum v. Hotel St. George Co., 18 Abb. N. C. (N. Y.) 340.

overloading of machinery such overloading may be restrained by the court.[70]

§ 188. **Jars and vibrations.**—Jars and vibrations produced upon a person's premises which cause injury to the land or structures of another constitute a nuisance which will be enjoined. And the right of jarring a structure upon the land of another cannot depend upon the utility or lawfulness of the purpose for which the power producing such jar is employed.[71] So, where the working of pumps in a brewery produced strong vibratory and jarring motions, which shook complainant's dwelling and rendered it unfit for habitation, it was decided that this constituted a nuisance which would be restrained.[72] And where the operation of machinery produced vibrations which rattled the doors and windows of a house and dishes upon the shelves, and caused the walls to crack, it was decided that this created a nuisance which would be restrained by the court, though it appeared that such results were to a great extent, if not entirely, due to the fact that there was a bed of quicksand beneath both properties.[73] So, where a person's building was jarred and injured by the vibrations and jar from a steam engine an injunction was issued.[74] And the use of a steam hammer was enjoined as a nuisance where it so affected another's building as to render it unfit for purposes of manufacture, business or occupancy, without risk to life or limb.[75] And a municipal license to run cable cars does not authorize one to materially injure another in his property right. So a nuisance was held to exist where the use of a steam engine to propel street cars by cable caused a continual jarring of a building on adjoining land, the plaster to crack, and the premises to be covered with soot.[76] But

70. Bowden v. Illuminating Co., 29 Misc. R. (N. Y.) 171, 60 N. Y. Supp. 835. See, also, Miller v. Edison Elec. Illum. Co., 33 Misc. R. (N. Y.) 664, 68 N. Y. Supp. 900.

71. McKeon v. See, 4 Rob. (N. Y.) 449.

72. Dittman v. Repp, 50 Md. 516, 33 Am. Rep. 325. As to breweries and distilleries, see § 110, herein.

73. Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374.

74. McKeon v. See, 27 N. Y. Super. Ct. 449, aff'd 51 N. Y. 300, 10 Am. Rep. 659.

75. Smith v. Ingersoll-Sergeant Rock Drill Co., 7 Misc. R. (N. Y.) 374, 27 N. Y. Supp. 907.

76. Tuebner v. California St. R. Co., 66 Cal. 171, 4 Pac. 1162. See

where the injury, discomfort or inconvenience occasioned by vibrations are almost imperceptible and wholly unsubstantial, equity will not grant any relief.[77] And where machinery has been erected and used in a lawful business for several years, without objection on the part of a complainant, while the delay and acquiescence will not jeopardise his legal rights, yet they are circumstances which will justify a court of equity in refusing an injunction and applying the rule that a complainant having an adequate remedy at law for the damages must establish his right to relief at law before a court of equity will interfere.[78] In an action for injuries due to such causes evidence of the fact that a house in the vicinity of plaintiff's has been rented during the entire period is not admissible.[79]

§ 189. **Distinction between nuisances affecting air and those affecting land or structures.**—A distinction is made between that class of nuisances which affect air or light and those which affect the land itself or the structures upon it. In the former class of nuisances such as those caused by smoke, noisome smells, or noises there must be a substantial annoyance materially affecting one in his ordinary comforts of his home, or an injury to health, business or property. In the latter class none of these elements is essential, it being sufficient if the jar or vibration sensibly or injuriously affects the land, dwelling, or structure of another.[80] In the case just cited it was said by the court: "Upon reason and authority I think there is a clear distinction between that class of nuisances which affect air and light merely by way of noises and disagreeable gases, and obstruction of light, and those which directly affect the land itself, or structures upon it. Light and air are elements

Rogers v. Philadelphia Traction Co., 182 Pa. 473, 38 Atl. 399, 61 Am. St. R. 716.

77. Shaw v. Queen City Forging Co., 7 Ohio N. P. 254, 10 Ohio S. & C. P. Dec. 107. See Chamberlain v. Missouri Elec. L. & P. Co., 158 Mo. 1, 57 S. W. 1021.

78. Goodall v. Crofton, 33 Ohio St. 271, 31 Am. Rep. 535.

79. Chamberlain v. Missouri Elec. L. & P. Co., 158 Mo. 1, 57 S. W. 1021.

80. Hennessy v. Carmony, 50 N. J. Eq. 616, 25 Atl. 374. As to smoke, see § 137, herein. As to noisome smells, see § 162, herein. As to noises, see § 182, herein.

which mankind enjoy in common, and no one person can have an exclusive right in any particular portions of either; and as men are social beings and by common consent congregate, and need fires to make them comfortable and to cook their food, it follows that we cannot expect to be able to breathe air entirely free from contamination, or that our ears shall not be invaded by unwelcome sounds. . . . While my neighbor may stand by my fence on his own lot and breathe across it over my land, and may permit the smoke and smell of his kitchen to pass over it, and may talk, laugh and sing or cry, so that his conversation and hilarity or grief is heard in my yard, he has no right to shake my fence ever so little, or to throw sand, earth, or water upon my land in ever so small a quantity. To do so is an invasion of property, and to continue to do so is a nuisance; and if he may not shake my fence or my house by force directed immediately against them, I know of no principle by which he may be entitled to do it by indirect means. . . . The question here, then, is not so much whether the effect of the noise and vibration caused by the rapid revolution of the defendant's machines is to render complainant's house less comfortable to live in (though that is a matter to be considered), but rather whether the complainant's land or dwelling is sensibly and injuriously affected by the vibration. If it be so, then it seems to me he ought, in the absence of any equitable defense, to be entitled to relief." [81]

81. Per Pitney, V. C.

The words of the court in St. Helens Smelting Co. v. Tipping, 11 H. L. Cas. 642, 650, are also pertinent in this connection. It was said in that case: "In matters of this description it appears to me that it is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, everything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance, must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary

§ 190. **Jar and vibraton—Defendant may show injury due to other cause.**—In an action by one for injuries caused by jar and vibration produced upon the land of another, the latter may show that the injuries alleged were due to other causes than complained of. So where it was alleged that the injuries complained of were caused by a jar from the operation of defendant's machinery, the latter was permitted to show that the jar and vibration from passing railroad trains was many times greater than that from his machinery, as tending to prove that the injuries were solely due to the latter cause.[82]

§ 191. **Damages recoverable.**—In an action by an owner of property for injury thereto caused by jar and vibration there may be a recovery for loss of rental value but not for a reduction of rent on account thereof made during the continuance of a lease and while the tenant could have been compelled to pay the full amount called for by the lease.[83] In the case of one who leases property with a knowledge of the fact that there is a jar and vibration caused by the operation of machinery upon the adjoining premises, he cannot, as lessee, recover therefor unless the damages sustained are in excess of those suffered prior to the commencement of the lease.[84] Again, in an action to abate a nuis-

for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. If a man lives in a street where there are numerous shops, and a shop is opened next door to him, which is carried on in a fair and reasonable way, he has no ground for complaint, because to himself individually there may arise much discomfort from the trade carried on in that shop. But when an occupation is carried on by one person in the neighborhood of another and the result of that trade, or occupation, or business, is a material injury to property, then there unquestionably arises a very different consideration. I think, my Lords, that in a case of that description, the submission which is required from persons living in society to that amount of discomfort which may be necessary for the legitimate and free exercise of the trade of their neighbors, would not apply to circumstances the immediate result of which is sensible injury to the value of property." Per the Lord Chancellor.

82. Eller v. Koehler, 68 Ohio St. 51, 67 N. E. 89.

83. Miller v. Edison Elec. Illum. Co., 33 Misc. R. (N. Y.) 664, 68 N. Y. Supp. 900.

84. Bly v. Edison Elec. Illum. Co., 54 App. Div. (N. Y.) 427, 66 N. Y.

ance and for general damages but in which the real remedy is injunction and the claim for damages is ancillary only, it is decided in a recent case in England that, the injunction being granted, substantial damages are not recoverable, but that the plaintiff is entitled to recover something for the injury prior to the judgment, not by way of compensation, but as an acknowledgment of the wrong.[85]

Supp. 737. See further as to this case and case in preceding note, sections on Damages in chap. 19, herein.

85. Lipman v. George Pulman & Sons, 91 Law T. (N. S.) 132.

CHAPTER XI.

Animals and Animal Enclosures.

Section 192. Vicious animals.
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§ 192. **Vicious animals.**—Aside from any question of negligence or wilful or malicious conduct on the part of the owner of a domestic animal it was a generally recognized rule at common law that he was not liable for injuries inflicted by such an animal unless it was vicious and he had knowledge or notice of such fact.[1]

1. Harvey v. Buchanan, 121 Ga. 384, 49 S. E. 281; Feldman v. Sellig, 110 Ill. App. 131; Fritsche v. Clemow, 109 Ill. App. 355; Carroll v. Marcoux, 98 Me. 259, 56 Atl. 848; Feltman v. Hencken & Willenbrock Co. (N. Y. Sup.), 91 N. Y. Supp. 773.

Knowledge of an attempt to bite is a sufficient notice of viciousness. Rowe v. Ehrmantraut, 92 Minn. 17, 99 N. W. 211.

If facts were sufficient to put a reasonable man on inquiry as to whether a dog was dangerous or not and the owner of the animal

These questions have generally arisen in cases where an injury has been inflicted by a dog, which when vicious is a nuisance,[2] and one who keeps such an animal after knowledge of his viciousness does so at his peril.[3] In this connection it has been declared that "the doctrine is well settled that the owner or keeper of a domestic animal which is vicious and prone or accustomed to do violence, having knowledge of such violent disposition or habit, must safely and securely keep such animal so that it cannot inflict injury. Whether or not there was special negligence in permitting the dog's escape from the premises is not the inquiry. The keeper must, at his peril, safely keep such animal. Such is the condition on which the ownership or custody of known vicious animals is tolerated. Ownership or custody of such vicious animal is not one of the natural, inherent rights of property. It is a qualified or restricted right. Qualified by the condition that the animal can be and is safely confined and kept."[4] So where a person entered the premises of another from the rear, on lawful business, and was bitten by a ferocious dog running at large on the premises, the owner was

failed to heed the warning or totally disregarded such facts, he is liable to one injured. Nelson v. Bartlett, 89 App. Div. (N. Y.) 468, 85 N. Y. Supp. 817.

The reputation of a domestic animal for viciousness may be shown on the question of notice of that fact by the owner. Fisher v. Weinholzer, 91 Minn. 22, 97 N. W. 426.

2. Speckman v. Kreig, 79 Mo. App. 376, 2 Mo. App. Repr. 455.

A ferocious dog is a common nuisance which may be destroyed by any one. Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175, citing Dunlap v. Snyder, 17 Barb. (N. Y.) 561.

3. Frammell v. Little, 16 Ind. 251; Speckman v. Kreig, 79 Mo. App. 376, 2 Mo. App. Repr. 455; Gladstone v. Brunkhoist, 70 N. J. L. 130, 56 Atl. 142; Boler v. Sorgenfrei (N. Y. Sup., 1905), 86 N. Y. Suppl. 180; Mann v. Weiand, 81 Pa. St. 243; McCaskill v. Elliott, 5 Str. L. (S. C.) 196, 53 Am. Dec. 706.

4. Strouse v. Leipf, 101 Ala. 433, 437, 46 Am. St. R. 122, 125, per Stone, C. J., citing Cooley on Torts, 343, *et seq.*; 1 Addison on Torts, § 261; Whittaker's Smith on Negligence, 99; 2 Shearman & Redfield on Negligence, §§ 628, 631; The Lord Derby, 17 Fed. 265, 1 Am. & Eng. Encyc. of Law, 581; Garlick v. Dorsey, 48 Ala. 222; Nolan v. Traker, 49 Md. 460, 33 Am. Rep. 277. See 2 Cyc. 368, 369, and cases there cited in support of text.

Where person either as owner or bailee has such an animal in charge the rule is held to apply. Marsell v. Bowman, 62 Iowa, 57, 17 N. W. 176.

held liable in an action for damages, the court declaring "Though the gate was open and the plaintiff was on lawful business, it may be that he had no strict legal right to enter the premises from the rear. But this would be no justification for leaving dangerous dogs loose on the premises, to bite him or others that might so intrude. Such dangerous means of defense against mere trespassers the law will not countenance."[5] And where one, in the exercise of due care, is injured by a cow known to the owner to be vicious and which he was driving through a street, he may recover from the latter for the injury sustained.[6]

§ 193. **Diseased animals.**—In the exercise of a person's right to use his own land in his own way it has been decided that the turning of infectiously diseased sheep owned by him into a pasture adjoining that of his neighbor which is used for a similar purpose is not a nuisance.[7] But though an owner may have the right to keep upon his premises animals suffering from a contagious disease, yet he must use due diligence to prevent injury to his neighbor. Though the use by one of his stable as a shelter for diseased animals may not be a nuisance, yet where such stable is separated from that of his neighbor by a partition merely he must exercise such care as a prudent man would exercise to prevent contact with his neighbor's animals.[8] And an owner of a diseased animal who permits the same to go at large upon the highway or in public places where there is danger of communicating the disease, is liable as for a nuisance. So in an English case it was held that the bringing of a horse infected with glanders into a public place to the danger of infecting the Queen's subjects, was a misdemeanor at common law.[9] So a person has been held liable in trespass for

5. Conway v. Grant, 88 Ga. 40, 30 Am. St. R. 144, 146, per Bleckley, C. J.

6. Hewes v. McNamara, 106 Mass. 281.

7. Fisher v. Clark, 41 Barb. (N. Y.) 329.

8. Mills v. New York & Harlem R. R. Co., 2 Rob. (N. Y. Super. Ct.) 326.

9. Regina v. Henson, 1 Dearsley's Crown Cas. 24, also holding that an indictment which stated that the defendant knew that a mare which he brought into a fair was glandered was, after verdict, good, without an averment that the defendant knew that the glanders was a disease communicable to man.

the entry of diseased cattle owned by him into another's close,[10] as where sheep trespassed upon the plaintiff's land and communicated a dangerous disease to his cattle with which the sheep commingled.[11] And thus one owning diseased horses has no right to permit such animals to go at large upon the highway or to water them at a tank used for watering sound horses owned by others.[12]

§ 194. **Animals at large on highway.**—Where a horse or colt is unlawfully at large upon a highway it is held to be a nuisance and its owner liable for any damage which it may do whether it is vicious or not. Thus it was so held where a child three years old, while playing on the highway, was injured by a kick from a colt, it being declared that the owner of the animal was at fault in permitting it upon the highway at large without a keeper.[13]

§ 195. **Dog a nuisance by his barking.**—Where a dog haunts the premises of a person other than his owner and by his barking and howling becomes a nuisance by reason of his disturbing the peace and quiet of the occupants of the dwelling it has been decided that if the nuisance cannot be otherwise prevented, the dog may be killed.[14]

§ 196. **Use of animals shocking sense of decency.**—The use of animals in such a manner as to shock the sense of decency of residents in the vicinity will constitute a nuisance. So where a person keeps jacks and stallions and puts them to mares within full view

10. Anderson v. Buckton, 1 Strange, 192.

11. Barnum v. Vandusen, 16 Conn. 200.

12. Mills v. New York & Harlem R. R. Co., 2 Rob. (N. Y. Super. Ct.) 326.

13. Baldwin v. Ensign, 49 Conn. 113, 44 Am. Rep. 205. See Dickson v. McCoy, 39 N. Y. 400; Goodman v. Gay, 15 Pa. St. 188; Fallon v. O'Brien, 12 R. I. 518.

14. Woolf v. Chalker, 31 Conn. 121, 81 Am. Dec. 175.

A person upon whose premises a dog is in the habit of coming both day and night, barking and howling, to the great annoyance and disturbance of the peace and quiet of such person and his family, is held to have the right to kill such animal, where he has notified the owner and the latter refuses or willfully neglects to restrain the dog. Brill v. Flagler, 23 Wend. (N. Y.), 354.

of the occupants of a dwelling house, it has been held to be such a nuisance as would be enjoined by a court of equity.[15] And the fact that a person purchased his residence after the nuisance was established will not preclude him from obtaining such relief.[16] It has, however, been decided that authority given to a municipality to regulate occupations and callings within the city or to abate nuisances confers no power upon the municipality to pass an ordinance providing that it shall be a misdemeanor to keep stallions within the city for service.[17]

§ 197. **Ordinances as to animals.**—Under the powers conferred upon a municipality to exercise control over its streets and to prevent and abate nuisances it ordinarily has authority to prevent animals running at large in the streets and may provide by ordinance that animals under such circumstances are nuisances and may be impounded.[18] An ordinance of this character is binding upon non-residents as well as residents.[19]

§ 198. **Dead animals—Ordinance as to.**—A dead animal is not a nuisance *per se*.[20] It must, however, necessarily become one unless some disposition is made of it and a municipal

15. Hayden v. Tucker, 37 Mo. 214; Farrell v. Cook, 16 Neb. 483, 20 N. W. 720, 49 Am. Rep. 721.

16. Hayden v. Tucker, 37 Mo. 214.

17. Ex parte Robinson, 30 Tex. Civ. App. 473, 17 S. W. 1057. Compare Hoops v. Ipava, 55 Ill. App. 94.

18. Roberts v. Ogle, 30 Ill. 459, 83 Am. Dec. 201; Quincy v. O'Brien, 24 Ill. App. 591; Crosly v. Warren, 1 Rich. L. (S. C.) 385; Moore v. State, 11 Lea (Tenn.), 35. Compare Vorden v. Mount, 78 Ky. 86, 39 Am. Rep. 208, holding that authority to a town to enact ordinances "for the safety of property, the abatement or prevention of nuisances and for the convenience of the public good" confers no right to forbid by ordinance the running at large of stock and adjudging, where it has run at large, a forfeiture thereof and conferring a right on the municipality to sell the same. As to municipal powers over highways, see §§ 260-263, herein.

The obtaining of licenses for dogs may be required under an ordinance giving the right to prevent and remove nuisances. Washington v. Lynch, Fed. Cas. No. 17231, 5 Cranch C. C. 498.

19. Whitfield v. Longest, 28 N. C. 268. See Buffalo v. Webster, 10 Wend. (N. Y.) 99; Hellen v. Noe, 25 N. C. 495.

20. Schoen v. Atlanta, 97 Ga. 697, 25 S. E. 380, 33 L. R. A. 804; Un-

corporation has the right to prevent the carcasses of dead animals from becoming nuisances and to that end may prescribe by a reasonable ordinance, the manner and time in which owners may remove them and, in case of their failure to remove them in the time specified, to provide other means.[21] An owner, however, has certain property rights in a dead animal of which he cannot be arbitrarily deprived by ordinance without regard to the question whether the carcass has become a nuisance or not. Therefore while a municipality is clothed with ample authority, in the exercise of its police power, to protect the public against nuisances *per se,* or anything that is likely to become an offensive and dangerous nuisance, it cannot, in the absence of such conditions, in the first instance, deprive the owner of his property in the carcass of a dead animal without due process of law.[22] So an ordinance of a city will not be valid where it provides in substance that immediately upon the death of an animal, the owner shall be deprived of his property therein as such a provision is a taking of private property without due process of law.[23] But where the depositing of the carcasses of animals in certain places is a nuisance under the statute, the offense is complete

derwood v. Green, 42 N. Y. 140; Richmond v. Caruthers (Va., 1905), 50 S. E. 265.

21. Schoen v. Atlanta, 97 Ga. 697, 25 S. E. 380, 33 L. R. A. 804; Meyer v. Jones, 20 Ky. Law Rep. 1632, 49 S. W. 809.

Particular ordinance construed. Under an ordinance imposing upon the owner of a dead animal the duty of disposing of the carcass in such a manner that it shall not become a nuisance or of notifying one with whom the city had entered into a contract for removal in such cases "within twenty-four hours where such carcass may be found," and that it shall be removed by no other person except the latter fail to remove it within twenty-four hours after he is notified, it has been decided that for the twenty-four hours immediately following the death of an animal the owner may dispose of the carcass in any manner he sees fit. Alpers v. Brown, 60 Cal. 447.

22. Richmond v. Caruthers (Va., 1905), 50 S. E. 265, per Whittle, J. See Yates v. Milwaukee, 10 Wall. (U. S.) 505, 19 L. Ed. 384; Schoen v. City of Atlanta, 97 Ga. 697, 25 S. E. 380, 33 L. R. A. 804; State v. Paysson, 47 La. Ann. 1029, 17 So. 481, 49 Am. St. R. 390; Rendering Co. v. Behr, 77 Mo. 91, 46 Am. Rep. 6; Underwood v. Green, 42 N. Y. 140.

23. Richmond v. Caruthers (Va., 1905), 50 S. E. 265.

upon proof of the act specified, without regard to the intent of the person violating it.[24]

§ 199. **Dead animal on railroad right of way—Contributory negligence.**—Where a nuisance is created by the carcass of a dead animal upon a railroad right of way which is enclosed, one bringing an action to recover damages for such nuisance is not chargeable with contributory negligence in failing to enter such right of way and remove the carcass complained of, as to do this would amount to a trespass which one is under no obligation to commit in such cases.[25]

§ 200. **Livery stable not a nuisance per se.**—Though a livery stable in a built-up section of a city is a matter of some annoyance to the occupants of property in the immediate vicinity and may, to a certain extent, affect their comfort, especially if the locality is a residential one,[26] yet it is a generally accepted doctrine that a livery stable, even in a town or city, is not necessarily or *prima facie* a nuisance.[27] And in an action to abate as a nuisance a use of

24. Seacord v. People, 121 Ill. 623, 13 N. E. 194. As to statutory nuisances, see § 81-83, herein.

25. Missouri, K. & T. R. Co. v. Burt (Tex. Civ. App.), 27 S. W. 948.

26. "It cannot be denied that a livery stable in a town adjacent to buildings occupied as private residences is, under any circumstances, a matter of inconvenience and annoyance and must more or less affect the comfort of the occupants as well as diminish the value of the property for the purpose of habitation. But this is equally true of various other erections that might be mentioned which are indispensible and which do and must exist in all towns." Per Roberts, J., in Metropolitan Savings Bank v. Manion, 87 Md. 68, 39 Atl. 70.

27. Phillips v. Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. R. 230; Shivery v. Streeper, 24 Fla. 103, 3 So. 865; Shiras v. Olinger, 50 Iowa, 571, 32 Am. Rep. 138; King v. Hamill, 97 Md. 103, 54 Atl. 625; Metropolitan Savings Bank v. Manion, 87 Md. 68, 39 Atl. 70; St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, 41 Am. & Eng. Corp. Cas. 375; Dorgan v. Waddill, 31 N. C. 244, 49 Am. Dec. 421; Fisher v. Sanford, 12 Pa. Super. Ct. 435; Harvey v. Ice Co., 104 Tenn. 583, 58 S. W. 316; Kirkman v. Handy, 11 Humph. (Tenn.) 406, 54 Am. Dec. 45; Burditt v. Swenson, 17 Tex. 489, 67 Am. Dec. 665; Flint v. Russell, Fed. Cas. No. 4876, 5 Dill. 151. Compare Coker v. Birge, 10 Ga. 336.

property for such a purpose the burden is on the complainant to show that it is a nuisance.[28]

§ 201. **Livery stable nuisance from manner of construction or conducting.**—Though a livery stable is not a nuisance *per se*,[29] it may become one by reason of the manner in which it is constructed or conducted.[30] And one using property for such a purpose must exercise care to prevent it from becoming a nuisance.[31] So where the odors and noises from a livery stable occasion substantial annoyance or discomfort to the occupants of adjoining premises or impair their value for their reasonable and natural use an actionable nuisance is created.[32] It is not necessary to enable one to maintain an action for such a nuisance that his dwelling house should be rendered useless thereby, it being sufficient if the injury is such as to render the enjoyment of life uncomfortable. Therefore where the noises and smells from a livery stable are such as to produce this result or to render the home uncomfortable as a dwelling house and unfitted for the proper purposes for which it was designed, it is sufficient.[33] And it has been held to be no defense to such an action that there was a smaller stable in existence upon the defendant's premises before the plaintiff's house was

28. Fisher v. Sanford, 12 Pa. Super. Ct. 435.

29. See preceding section.

30. Phillips v. Denver, 19 Colo. 179, 34 Pac. 902, 42 Am. St. R. 230; Metropolitan Savings Bank v. Manion, 87 Md. 68, 39 Atl. 90; St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, 411 Am. & Eng. Corp. Cas. 375; Dorgan v. Waddill, 31 N. C. 244, 49 Am. Dec. 421; Filson v. Crawford (N. Y. Sup.), 5 N. Y. Supp. 882, 23 N. Y. St. R. 335; Harvey v. Ice Co., 104 Tenn. 583, 58 S. W. 316; Kirkman v. Handy, 11 Humph. (Tenn.) 406, 54 Am. Dec. 45; Burditt v. Swenson, 17 Tex. 489, 67 Am. Dec. 665.

31. Dorgan v. Waddill, 31 N. C. 244, 49 Am. Dec. 421.

32. Dorgan v. Waddill, 31 N. C. 244, 49 Am. Dec. 421; Robinson v. Smith, 53 Hun (N. Y.), 638, 7 N. Y. Supp. 38; Drysdale v. Dugas, Rap. Jud. Queb. 6 Q. B. 278.

A police ambulance stable though owned by a municipality and used by it in the exercise of its governmental powers or functions, should be maintained by the municipality in a proper condition and it will be liable, where the stable is so conducted as to become a nuisance, to one injured thereby without regard to the question whether it derives any profit from the maintenance of such stable. Roth v. District of Columbia, 16 App. D. C. 323.

33. Aldrich v. Howard, 8 R. I. 246.

built and that such stable caused as great an annoyance as the one complained of.[34] And a landlord is held to be a proper party defendant with his tenant to an action for damages to enjoin the nuisance where the former consented to the construction and maintenance of such a nuisance by the latter and was notified of the nuisance and requested to abate the same.[35]

§ 202. **That stable properly built or kept no defence.**—The fact that a livery stable is properly built or is carefully conducted and maintained is no defence where a nuisance actually exists.[36] As is said in this connection in a case in Rhode Island, "Yet if it is so built or so used as that it destroys the comfort of persons owning and occupying adjoining premises, creating such an annoyance as to render life uncomfortable, then it is none the less a nuisance, that it is well kept, carefully built and as favorably located as the town will admit. The question still is, does it in fact render life uncomfortable? The admissions imply no more than that if care in building and proper, careful keeping would have prevented the injurious effects complained of, they would not have resulted from the use of this stable. But the claim of the plaintiff is, that they were insufficient to prevent it, and the question was stated did this stable injuriously affect the plaintiff's dwelling to the extent alleged?"[37] So where the odors from a livery stable cause a substantial inconvenience and annoyance to residents in the neighborhood, it is no defense to an action therefor that in the construction of the stable it was equipped with all modern improvements for drainage and ventilation.[38]

§ 203. **That location of stable is desirable or convenient is no defense.**—It is no defense to an action for nuisance consisting of a stable that the location is a desirable one and furnishes accommo-

34. Filson v. Crawford (N. Y. Sup.), 5 N. Y. Supp. 882, 23 N. Y. St. R. 335.

35. Robinson v. Smith, 53 Hun (N. Y.), 638, 7 N. Y. Supp. 38.

36. Filson v. Crawford (N. Y. Sup.), 5 N. Y. Supp. 882, 884, 23 N. Y. St. R. 335; Rapier v. London Tramways Co. (1893), 2 Ch. 588. As to negligence as an element in case of a trade or business, see § 92, herein.

37. Aldrich v. Howard, 8 R. I. 246, 249, per Brayton, J.

38. Drysdale v. Dugas, 26 Can. S. C. 20. As to noisome smells, see §§ 157-173, herein.

dations for those in its vicinity.[39] As was said by the court in this case: "It would doubtless be a desirable arrangement for many persons engaged in keeping livery or boarding stables, and also be convenient for some of their customers, if such stables could be located upon every block in the finest street in the city, but it will hardly be claimed that such stables should be so located when the inevitable result would be to cause incalculable injury to the adjoining property. The evidence shows that there were numerous other places, nor far from the location selected by the defendants, which could have been purchased for stable purposes and at less prices than that which was paid by defendants for the property upon which their stable is now located. The evidence shows that Seventy-second and Seventy-third streets are two of the finest streets on the west side of the city, and it seems to me that the use of the property purchased and owned by the defendants for a stable, which is so kept as to be a nuisance, is most unreasonable."[40]

§ 204. **Private stable or barn.**—A private stable or barn, like a livery stable, is not a nuisance *per se,* but may become one from the manner in which it is built or kept.[41] As is said in one case, "while the building of this stable may not be a kindly or neighborly act, yet with this the courts have nothing to do, they are simply to decide whether in itself it is an unlawful one, and therefore to be suppressed."[42] So an owner is injured in his property rights and is entitled to an injunction where the odors from a stable on adjoining premises are so offensive as to render the occupancy of the property by his tenants materially uncomfortable and disagree-

39. Filson v. Crawford, 5 N. Y. Supp. 882, 23 N. Y. St. R. 335.

40. Per Andrews, J. See, also, Aldrich v. Howard, 8 R. I. 246.

41. St. James Church v. Arrington, 36 Ala. 546, 76 Am. Dec. 332; Kaspar v. Dawson, 71 Conn. 405, 42 Atl. 78; Rounsaville v. Kohlheim, 68 Ga. 668, 45 Am. Rep. 505; Keiser v. Lovett, 85 Ind. 240, 44 Am. Rep. 10; Albany Christian Church v. Wilborn, 23 Ky. Law Rep. 1820, 66 S. W. 285; Gallagher v. Flury, 99 Md. 181, 57 Atl. 672; Hockaday v. Wortham, 22 Tex. Civ. App. 419, 54 S. W. 1094; Gifford v. Hulett, 62 Vt. 342, 346, 19 Atl. 230.

Though constructed in violation of an ordinance on the building line of a street it is not a nuisance *per se.* King v. Hamilll, 97 Md. 103, 54 Atl. 625.

42. Rounsaville v. Kohlheim, 68 Ga. 668, 45 Am. Rep. 505. Per Crawford, J.

able.[43] In such cases, however, where the nuisance consists of the manner in which the stable or barn is kept, the use of the same will not be perpetually enjoined but an injunction will be granted to prevent the continuance of the particular causes which constitute the nuisance. So where a defendant had been in the habit of depositing manure from his barn between the barn and the street, it was decided that the trial court might enjoin the defendant from so depositing it within a certain distance of plaintiff's premises, it not appearing that the distance was unreasonable or that it was adopted arbitrarily and without evidence. And in such a case there is not an unreasonable interference with a defendant's rights in requiring him to remove manure from his premises daily.[44] Again where the nuisance consists of several causes, part of which have been removed since the commencement of the action, it has been decided that the injunction should be so framed as to prevent the continuance of the nuisance existing at the time of the trial.[45]

§ 205. **Proceeding to enjoin erection of stable.**—As neither a livery nor a private stable is a nuisance *per se*, an injunction restraining the erection of a structure to be used for such a purpose will not be granted unless it appear in the particular case that it will in fact be a nuisance.[46] So where a building used as a livery stable had been burned down the court refused to enjoin its rebuilding and use for such purpose.[47] So it was decided that an injunction restraining the erection of a stable on a lot adjoining that on which plaintiff's residence was situated on the ground of anticipated annoyances and inconveniences consisting of bad odors and the gathering of vermin, would not be granted, as these results were mere conjectures or apprehensions which would be realized

43. Kaspar v. Dawson, 71 Conn. 405, 42 Atl. 78, holding that he is entitled to such relief though his tenants are not made parties to the proceeding.

44. Kaspar v. Dawson, 71 Conn. 405, 42 Atl. 78. See, also, Gifford v. Hulett, 62 Vt. 342, 19 Atl. 230; Curtis v. Winslow, 38 Vt. 690.

45. Trulock v. Merte, 72 Iowa, 510, 34 N. W. 307.

46. Keiser v. Lovett, 85 Ind. 240, 44 Am. Rep. 10; King v. Hamill, 97 Md. 103, 54 Atl. 625; Flint v. Russell, Fed. Cas. No. 4876, 5 Dill. 151. As to injunction against erection of a building for business or trade, see § 103, herein.

47. Shiras v. Olinger, 50 Iowa, 571, 33 Am. Rep. 138.

if the stable should be neglected and filth allowed to accumulate, which condition was not to be presumed.[48] And in another case it was seld that the court would not enjoin the erection, near a church, of a building to be used as a stable, on the ground that it would be a nuisance when used for the purpose proposed.[49] So in this case it was said: "A private stable near a church, does not belong to the class of erections which are unavoidably and in themselves nuisances. That it may become a nuisance, is no doubt true; but the question whether or not it will prove to be one depends, in a great measure, upon its proximity to the church, the manner in which it may be built, the number of horses placed in it, and the degree of care with which it may be kept; and hence it is not susceptible of definite settlement, until the building is completed and applied to the use for which it was designed."[50] Again, where by statute the use and occupation of a building for a livery stable or a stable for taking or keeping horses and carriages for hire or to let within two hundred feet of a church or meeting house erected and used for the public worship of God, without the consent in writing of the religious society or parish worshipping therein, was prohibited, it was decided, in a bill in equity to enjoin the erection of a stable as being in violation of the statute, that such statute was not applicable where the stable to be constructed was to be let out in specified parts to tenants who were to take care of their own horses, as the legislature had drawn the line between stables where horses were taken in for pay or were kept to be let out on the one hand and all other stables on the other hand, and that the proposed stable belonged to the latter class.[51] And it has been declared that an individual cannot complain of the erection of a building to be used as a stable in violation of an ordinance of a city or town unless it is shown that the erection will work special and irreparable injury to him and his property.[52] If, however, it is shown that the livery stable, when erected and in use, will con-

48. Gallagher v. Flury, 99 Md. 181, 57 Atl. 672, 675.

49. St. James Church v. Arrington, 36 Ala. 546, 76 Am. Dec. 332.

50. Per R. W. Walker, J.

51. Congregation Beth Israel v. O'Connell, 187 Mass. 236, 72 N. E. 1011, construing Mass. R. L. c. 102, § 70.

52. King v. Hamill, 97 Md. 103, 54 Atl. 625, per Boyd, J.

stitute a nuisance it is then decided that its erection will be enjoined.[53] So where a person was about to erect a livery stable, with a plank floor, on a public street in a city, upon his own land, for the purpose of keeping horses therein, within sixty-five feet of a public hotel owned and kept by another, and the latter having applied for an injunction, alleging that the erection of the stable would cause irreparable injury to his property in said hotel, and result in the loss of health and comfort to himself and family, and in the loss of patronage to his hotel, in consequence of the unhealthy effluvia that would arise from the stable, the collection of swarms of flies, and the stamping of horses therein, it was held that the erection of the stable at the place stated would operate as a nuisance to the owner of the hotel and that he was entitled to an injunction to restrain its erection.[54] And it is decided that a party will not be precluded from his right to maintain such an action by the fact that he has leased his property for a term of years and is not in possession thereof.[55]

§ 206. **Proceeding to enjoin proposed use of building as stable.** —The use of a building for the purposes of a livery stable not being in itself a nuisance, a court will not restrain the proposed use of a building for such a purpose in the absence of evidence showing that such use will actually result in a nuisance. Therefore, where it was sought to enjoin the use of a building, contiguous to plaintiff's dwelling, for the purpose of stabling horses on the ground of noxious and offensive odors therefrom, the court refused to enjoin such use where the affidavits of the defendants alleged that the building would be used without causing any annoyance or injury to adjoining owners.[56]

53. Filson v. Crawford (N. Y. Sup.), 5 N. Y. Supp. 882, 23 N. Y. St. R. 335; Collins v. City of Cleveland, 2 Ohio S. & C. P. Dec. 380. See Aldrich v. Howard, 7 R. I. 87, 80 Am. Dec. 636.

54. Coker v. Birge, 9 Ga. 425, 54 Am. Dec. 347, S. C. 10 Ga. 336, holding that the court would not discharge the *ad interim* interdict so as to permit the experiment to be made whether a livery stable could be constructed and maintained in such a manner as not to be a nuisance.

55. Filson v. Crawford (N. Y. Sup.), 5 N. Y. Supp. 882, 23 N. Y. St. R. 335.

56. Stilwell v. Buffalo Riding Academy, 21 Abb. N. C. (N. Y.) 472, 4 N. Y. Supp. 414.

§ 207. **Evidence on the question of nuisance—Stables.**—Where a plaintiff complains of such a nuisance to his dwelling rendering the air unwholesome, evidence is admissible to show the condition of the atmosphere in the plaintiff's dwelling from the time of the erection of the stable complained of down to the time of trial.[57] An the fact that there has been a great congregation of flies about the plaintiff's premises since the annoyance complained of is one which may be legitimately considered in connection with other evidence.[58] In an action, however, to enjoin the maintenance of such a nuisance on the ground of the unwholesome odors, a defendant should be permitted to show that the odors complained of came from other sources than his stable.[59] But in such a case the question is whether the stable complained of is a nuisance and not any other stable and therefore it is proper to exclude evidence offered by a defendant for the purpose of showing that other stables similarly situated did not create such annoyances as are alleged.[60] Where the facts are fully presented to the jury so that they may judge for themselves whether a nuisance exists, a witness cannot be asked whether in his opinion the conditions as shown by the evidence constitute a nuisance.[61]

§ 208. **Cattle pens, yards and piggeries.**—The existence in cities or populated sections of pens or other enclosures for cattle from which noises and unhealthy odors are emitted which cause substantial annoyance to the occupants of neighboring property and injures another either in his health or business, constitutes a nuisance which may be enjoined.[62] So a nuisance exists where stock pens used in connection with a slaughter house are permitted to become and remain in a filthy condition, thus continuously emitting noxious odors.[63] So a piggery will be regarded as a nuisance

57. Robinson v. Smith, 53 Hun (N. Y.), 638, 7 N. Y. Supp. 38, 42.

58. Robinson v. Smith, 53 Hun (N. Y.), 638, 7 N. Y. Supp. 38, 42.

59. Kaspar v. Dawson, 71 Conn. 405, 42 Atl. 78.

60. Aldrich v. Howard, 8 R. I. 246.

61. Metropolitan Savings Bank v. Manion, 87 Md. 68, 39 Atl. 90.

62. Ohio & M. Ry. Co. v. Simon, 40 Ind. 278; Beckham v. Brown, 19 Ky. Law Rep. 519, 40 S. W. 684; Board of Aldermen of Opelousas v. Norman, 51 La. Ann. 736, 25 So. 401; State, Raritan Township Bd. of Health v. Henzler (N. J. Ch.), 41 Atl. 228. See Dubois v. Budlong, 10 Bosw. (N. Y.) 700, 15 Abb. Prac. 445.

63. Wilcox v. Henry (Wash., 1904), 77 Pac. 1055.

where it is maintained in a locality where the odors therefrom pollute the atmosphere so as to substantially annoy the public or interfere with comfortable occupation and enjoyment of a dwelling by the occupant.[64] In reference to a nuisance of this character it is said in a case in Pennsylvania: "In the country—in rural districts—pig pens and other unflagrant things may be maintained upon somewhat different terms and conditions than those applying where such practices are indulged in within a borough. In the rural districts pig pens have to be maintained, manure and fertilizers must be accumulated in large quantities, and neighbors and the traveling public are usually at such a distance as to escape substantial discomfort. Moreover, in the country, hogs are not, generally speaking, fed on offal matter, nor constantly confined to pens. In a borough there is not the same necessity nor fitness for the odorous conditions referred to, and owing to the greater density of population, greater care and consideration are required to avoid trespassing on the rights of others. One who maintains piggeries or accumulates large quantities of offensive matter within the limits of a borough, especially if at a point in or near a built-up portion of the borough, does so at his peril,—that is to say, even though he may exercise every precaution to avoid the creation of offensive odors, he is guilty of maintaining a public nuisance, if as a consequence of his practices the atmosphere is polluted and the public is substantially annoyed."[65] And where pig pens give forth a stench which constitutes a nuisance, it is immaterial that the defendant kept the pens as clean as they could be kept under the circumstances.[66] Again, where a family was seriously annoyed and disturbed in the occupation of a dwelling by the bleating of calves which were kept overnight in an enclosure for the purpose of being slaughtered in the morning, there was held to be a nuis-

64. Commonwealth v. Perry, 139 Mass. 198, 29 N. E. 656; Commonwealth v. Armstrong, 24 Pa. Co. Ct. R. 442. See Smith v. McConathy, 11 Mo. 517.

A pigsty is a nuisance per se where maintained within a few feet of a dwelling. Whipple v. McIntyre, 69 Mo. App. 397.

65. Commonwealth v. Armstrong, 24 Pa. Co. Ct. 442, per Butler, Jr., A. L. J.

66. Burlington v. Stockwell, 5 Kan. App. 569, 47 Pac. 988. As to duty as to care in case of business or trade, see § 89, herein.

ance which could be enjoined.[67] And where a yard used for feeding cattle constitutes a nuisance and there is no reason to suppose that any mode of use could be adopted which would obviate the trouble, as where it arises from the wet and miry condition of the soil, it is proper to enjoin such use of the lots absolutely.[68] And in such an action it is held that it is not competent for a defendant to show that a lot owned by the plaintiff is used by him for a similar purpose and is in a worse condition than the defendant's.[69]

§ 209. **Stock yards and cattle cars.**—Stock yards are not of themselves necessarily nuisances, yet they may be such under some circumstances though well kept and cared for. The fact that they are managed with ordinary care and kept about as well as other well conducted establishments of the kind does not avail the defendant where such yards are a nuisance.[70] And in a proceeding by a party to enjoin the abatement of its stock pens as a nuisance, it is decided that evidence is not admissible of the existence of cattle pens in the immediate vicinity and that they were kept in such a manner that stenches arose therefrom, as one who maintains a nuisance cannot justify his act by the fact that similar nuisances are maintained by others in the vicinity or that the nuisance was caused by himself and others acting together or independently of each other.[71] Nor where stockyards are maintained by a railroad company which are a nuisance by reason of the offensive odors injurious to the health of the occupants of nearby dwellings can the company avoid liability for damages to such persons on the ground that the maintenance of the yards is essential to the operation of the road and that the odors complained of cannot be avoided where it neither appears that the odors are unavoidable nor that the yards

67. Bishop v. Banks, 33 Conn. 118, 87 Am. Dec. 197. But compare Ballentine v. Webb, 84 Mich. 38, 47 N. W. 485.

68. Baker v. Bohannon, 69 Iowa, 60, 28 N. W. 435.

69. Baker v. Bohannon, 69 Iowa, 60, 28 N. W. 435.

70. Bielman v. Chicago, St. Paul & Kansas City R. R. Co., 50 Mo. App. 151. See Herbert v. St. Paul City Ry. Co., 85 Minn. 341, 88 N. W. 996; Anderson v. Chicago, M. & St. P. Ry. Co., 85 Minn. 337, 88 N. W. 1001.

71. Pittsburg, C., C. & St. L. Ry. Co. v. Crothersville, 159 Ind. 330, 64 N. E. 914.

could not have been maintained in another locality.[72] And where a nuisance is caused by a railroad company permitting its cattle cars, containing filth, producing offensive odors, to remain on a side track near a dwelling, the company cannot avoid liability by the fact that the construction and operation of its road was authorized by legislative grant unless it appear that such a result could not be avoided by a proper operation of the road.[73] Nor will a statutory provision requiring railroad companies to furnish the shippers of live stock with proper facilities to convey and transport the same,[74] confer authority upon them to maintain stock yards in an improper manner, so as to constitute a nuisance, to the injury of adjacent property owners.[75] In an action, however, to enjoin the maintenance of stockyards by a railroad company in a certain locality, evidence is admissible to show that it neither reasonably practical nor convenient to locate them elsewhere.[76]

§ 210. **Construction and maintenance of stables or cattle enclosures as affected by ordinance.**—The right to construct or maintain a stable or a cattle enclosure is to a great extent in cities controlled or regulated by ordinance, under the powers conferred upon the municipality by the legislature. The extent to which this right of control or regulation may be exercised is dependent upon the nature and extent of the power granted in the particular case which may be either express, having reference to such enclosures, or under the general power conferred to regulate and abate nuisances and to safeguard the public health. So it has been decided that the city of St. Louis has power to limit livery stables to certain localities and to provide for their cleanliness.[77] So where an ordinance provides that the keeping of cattle within the corporate limits shall constitute a nuisance, it has been decided that a nuisance

72. Shively v. Cedar Rapids, I. F. & N. W. R. Co., 74 Iowa, 169, 37 N. W. 133, 7 Am. St. R. 471.

73. Cleveland, C., C. & St. L. R. Co. v. Pattison, 67 Ill. App. 351.

74. See Minn. Gen. St. 1894, § 2710.

75. Anderson v. Chicago, M. & St. P. Ry. Co., 85 Minn. 337, 88 N. W. 1001.

76. Dolan v. Chicago, M. & St. P. Ry. Co., 118 Wis. 362, 95 N. W. 385.

77. St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, 41 Am. & Eng. Corp. Cas. 375.

consisting of cattle yards and pens within township limits where cattle are enclosed and fattened for market and which is so maintained as to necessarily become a nuisance, may be abated.[78] And where by statute the erection of stables in a city is prohibited without a license from the board of health, it has been decided that the question whether a stable will constitute a nuisance is one for that board to determine and that its decision in granting a license is final and conclusive, at least until the building is erected and it is shown that it actually constitutes a nuisance.[79] It has, however, been determined that the power granted to a city to control the location in such cases, being a legislative one, cannot by ordinance be delegated to the owners of property in a block where the erection of the stable is proposed.[80] And where by statute the power is given in general terms to the board of health of a town to pass ordinances to regulate the drainage of stables and there is no language which authorizes the board to prescribe a mode to which stable owners must rigidly conform, it has been decided that an ordinance is void which restricts the owners of stables to a certain mode of laying the floor and that the owner is not restricted to the mode prescribed. In such case, however, an owner who follows this mode is not amenable to prosecution, while if he departs therefrom and creates a nuisance, he is.[81] Again, while a city may by ordinance control and regulate nuisances it cannot by an unreasonable ordinance prohibit a certain thing, such as a stable, which is not a nuisance *per se*.[82] So an ordinance prohibiting the location of a livery stable in any block in which a school building is situated, or in any block which is opposite to a block in which a school build-

78. Board of Aldermen of Opelousas v. Norman, 51 La. Ann. 736, 25 So. 401.

A board of health may abate such a nuisance under the general powers conferred upon it without regard to an ordinance of a town or city upon the subject. State, Raritan Township Board of Health v. Henzler (N. J. Ch.), 41 Atl. 228.

79. White v. Kenney, 157 Mass. 12, 31 N. E. 654.

80. St. Louis v. Russell, 116 Mo. 248, 22 S. W. 470, 20 L. R. A. 721, 41 Am. & Eng. Corp. Cas. 375.

81. State, Morford v. Board of Health of Asbury Park, 61 N. J. L. 386, 39 Atl. 706.

82. Phillips v. City of Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. R. 230.

ing is situated, without reference to the manner in which such stable is constructed, kept or used, and without specifying the distance, cannot be regarded as reasonable, and so cannot be upheld as valid under a general or incidental grant of authority to the municipality assuming to pass it.[83] The court said in this case: "The ordinance in question is not directed against livery stables improperly kept or used, but against all livery stables within the prescribed limits. There is nothing to indicate that there was anything improper in the construction, keeping, or use of defendant's stable. The sole contention on the part of the city, therefore, is confined to the single fact that defendant had located and conducted his stable within the limits prohibited by the ordinance —that is, in a block opposite to a block in which a school building was situated. The ordinance, however, does not undertake to declare that a livery stable conducted within the interdicted limits shall be deemed a nuisance *per se;* nor do we intimate that such an ordinance would have been valid if passed. . . . There is no definite distance from a school building within which the construction and carrying on of livery stables are prohibited by the ordinance. . . . An ordinance so uncertain, so indefinite, so unsuitable and unsatisfactory to accomplish the desired object, cannot be regarded as reasonable; and so cannot be upheld under the authority supposed to be granted by the city charter."[84] Again, where a municipal ordinance provided that "to erect hog-pens within any enclosure in the city limits, or to permit hogs to run at large within any lot or enclosed place in the city" except at certain designated places constituted a nuisance to be abated as such, it was decided that the ordinance was invalid by reason of its broad and sweeping character.[85] And where the thing prohibited by ordinance is not a nuisance *per se* it has been determined that equity will not lend its aid to the enforcement of the provisions of such ordinance.[86]

83. Phillips v. City of Denver, 19 Colo. 179, 34 Pac. 902, 41 Am. St. R. 230.

84. Per Mr. Justice Elliott.

85. Ex parte O'Leary, 65 Miss. 80, 3 So. 144, 7 Am. St. Rep. 640.

86. Gallagher v. Flury, 99 Md. 181, 57 Atl. 672; Williamsport v. McFadden, 15 Wkly. Notes Cas. (Pa.) 269. Compare Dubos v. Dreyfous, 52 La. Ann. 1117, 27 So. 663, holding that an injunction will be granted

§ 211. **Damages recoverable—Cattle enclosures.**—Where a nuisance consists of a livery stable which is in the nature of a continuing or abateable nuisance the measure of damages is ordinarily the depreciation in the value of the use or the rental value of the properly affected,[87] in addition to which a compensation for other injury sustained may be allowed in a proper case. Thus it has been decided that the measure of damages is the extent of the injury caused in the estimation of which, in one case, it was declared the jury should consider the difference of rental value of the adjoining property before and after the negligent construction of the stable complained of, also whether sickness in plaintiff's family was caused by the defendant's negligence, as well as the cost and expense of moving from the premises provided such moving was compelled by defendant's negligence.[88] So in the case of nuisance arising from stock yards maintained by a railroad near the dwelling of the plaintiff it was decided that though the plaintiff's property was valueless while the nuisance existed he would not be entitled to recover the full value of his premises but that rather the depreciation in the rental value was the proper measure of damages.[89] Where, however, the defendant had expressed a purpose to continue the nuisance it was declared by the court in a case in Texas that it was not prepared to deny that there could not be a recovery of a sum equal to the depreciation in value.[90]

to enforce a municipal ordinance in respect to partition walls, the ventilation, and the cleanliness of a stable.

87. Stroth Brewing Co. v. Schmitt, 25 Ohio Cir. Ct. R. 231.

88. Fisher v. Sanford, 12 Pa. Super. Ct. 435.

89. Shively v. Cedar Rapids, Iona Falls & M. W. Ry. Co., 74 Iowa, 169, 37 N. W. 133, 7 Am. St. R. 471. See Bielman v. Chicago, St. Paul & K. C. Ry. Co., 50 Mo. App. 151.

90. Hockaday v. Wortham, 22 Tex. Civ. App. 419, 54 S. W. 1094.

CHAPTER XII.

Nuisances Affecting Highways.

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§ 212. **Highways in general.**—The primary purpose for which streets and highways are ordinarily established is that of the free passage and repassage of the public.[1] Where there is no special restriction when acquired or dedicated, they are for the use of the public generally and not alone for the people of the town or municipality in which they are located.[2] And the public has the right to travel upon any portion of the highway which is not being used

1. Gray v. Baynard, 5 Del. Ch. 499; Augusta v. Reynolds (Ga. 1905), 50 S. E. 998; Garibaldi v. O'Connor, 210 Ill. 284, 287, 71 N. E. 379, 66 L. R. A. 73; Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 222; Cohen v. New York, 113 N. Y. 532, 21 N. E. 700, 23 N. Y. St. R. 509, 10 Am. St. R. 506, 4 L. R. A. 406; Wendell v. Mayor of Troy, 39 Barb. (N. Y.) 329; Wilkesbarre v. Burgunder, 7 Kulp (Pa.), 63; Llano v. Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008; Jochem v. Robinson, 66 Wis. 638, 29 N. W. 642, 57 Am. Rep. 298; Attorney-General v. Brighton & Hove Co.-op. Supply Ass'n, 69 L. J. Ch. 204 (1900), 1 Ch. 276, 81 Law T. (N. S.) 762; Rex. v. Russell, 6 East 427.

2. Charlotte v. Pembroke Iron Works, 82 Me. 391, 19 Atl. 902, 8 L. R. A. 828.

for the same purpose by some other traveler or which is not occupied by some legalized structure.[3] While the primary purpose for which a highway is established is that of the passage of the public yet its use for other purposes which are of a public nature is generally recognized. Among these are telegraph, telephone and electric light wires and poles therefor above the surface of the highway, and gas, water and sewage pipes beneath the surface. Though some of these uses could not have been in contemplation when the highways were originally established, yet with the advance and progress made as time passes certain uses have been recognized as legitimate uses not inconsistent with the use of the highway. So it has been determined and is a generally accepted principle that when a highway is dedicated without restriction to the public use it is always dedicated with regard to the necessities of future times. The following words by Judge Cooley are pertinent in this connection: "The restrictions upon its use are only such as are calculated to secure to the general public the largest practical benefit from the enjoyment of the easement, and the inconveniences must be submitted to when they are only such as are incident to a reasonable use under impartial regulations. When the highway is not restricted in its dedication to some particular mode of use, it is open to all suitable methods; and it cannot be assumed that these will be the same from age to age, or that new methods of making the way useful must be excluded merely because their introduction may tend to the inconvenience or even the injury of those who continue to use the road after the same manner as formerly. A highway established for the general benefit of passage and traffic must admit of new methods of use whenever it is found that the general benefit requires them; and if the law should preclude the adoption of the use to the new methods, it would defeat in greater or less degree, the purpose for which highways are established.[4]

3. First National Bank v. Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. R. 46, 59 L. R. A. 399.

4. Macomber v. Nichols, 34 Mich. 212, 216, 22 Am. Rep. 222, per Cooley, C. J. See Joyce on Electric Law, § 317.

Use of automobile or other new means of transportation. The following extract from the opinion in a case in Indiana which was an action to recover damages for personal injuries and for injuries to the plaintiff's horse and buggy, al-

§ 213. **Public property, squares and lands.**—Where property is dedicated to the public use for certain purposes it cannot be used in a manner foreign to its dedication and any encroachment thereon or use thereof which is inconsistent with such purpose will constitute a nuisance which may be enjoined.[5] So, where a

leged to have been the result of defendant's negligence in using an automobile upon the highway, is pertinent in this connection. "It cannot be said, as matter of law, that appellant was guilty of negligence for using an automobile as a means of conveyance on the public highway. The law does not denounce motor carriages, as such, on the public ways. For, so long as they are constructed and propelled in a manner consistent with the use of highways, and are calculated to subserve the public as a beneficial means of transportation, with reasonable safety to travelers by ordinary modes, they have an equal right with other vehicles in common use, to occupy the streets and roads. Because novel and unusual in appearance, and for that reason likely to frighten horses unaccustomed to see them, is no reason for prohibiting their use. In all human activities the law keeps up with improvement and progress brought about by discovery and invention, and, in respect to highways, if the introduction of a new contrivance for transportation purposes, conducted with due care, is met with inconvenience and even incidental injury to those using ordinary modes, there can be no recovery, provided the continuance is compatible with the general use and safety of the road. It is, therefore, the adaptation and use, rather than the form or kind of conveyance that concerns the courts. It is improper to say that the driver of the horse has rights in the road superior to the driver of the automobile. Both have the right to use the easement, and each is equally restricted in the exercise of his rights by the corresponding rights of the other. Each is required to regulate his own use by the observance of ordinary care and caution to avoid receiving injury as well as inflicting injury upon the other. And in this the *quantum* of care is to be estimated by the exigencies of the particular situation; that is, by the place, presence or absence of other vehicles and travelers; whether the horse driven is wild or gentle; whether the conveyance and power used are common or new to the road; the known tendency of any feature to frighten animals, etc. The restrictions which the law imposes upon all modes of travel and traffic on the highways are such as tend to secure to the general public the largest enjoyment of the easement, and must be observed and borne by all alike on the broad ground that all have an equal right to travel in safety; and when accidents happen as incidents to reasonable use and reasonable care, the law awards no redress." Indiana Springs Co. v. Brown (Ind. S. C., 1905), 74 N. E. 615, 616, per Hadley, J.

5. Wheeler v. Bradford, 54 Conn. 244, 7 Atl. 22; Llano v. Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008.

public square was dedicated by the county to the public, with a right reserved in the county to use it for the purpose of erecting a court house thereon, it has been decided that a jail and cesspool erected by the county on such square is not in keeping with the use for which the property was dedicated and constituted a public nuisance which was abatable.[6] And where the enclosure of public school lands obstructed the right of common, of travel, and of the removal of cattle to market, thus interfering with individual rights in public property, it was decided that it constituted a public nuisance which could be abated by injunction at the suit of the State, though by statute such an act was made a penal offense for which a prosecution and punishment was provided.[7] But the enclosure of public lands cannot be enjoined at the suit of an individual by reason of the fact that he owns lands in the vicinity and is deprived of the right of public pasturage thereon, as such injury is one sustained by all alike whose live stock graze in that vicinity or who seek to enjoy the pasturage afforded by such public lands.[8] As was said by the court in this case: "The injury, in other words, would be an injury to the public, and, if a nuisance at all, a public nuisance somewhat like the obstruction of a highway or the interference with public travel thereon. And it is an elementary principle that private persons, seeking the aid of equity to restrain a public nuisance, must show some special injury peculiar to themselves, aside from and independent of the general injury to the public. . . . Plaintiff's ownership of lands in the vicinity of these lands cannot be held to render the injury to him special or different from that suffered by the public generally, for the reason that such ownership confers upon him no peculiar right to the enjoyment of the public pasturage, nor any greater right, if any, than that possessed by those who own no land to object to the unauthorized assertion of a right to the exclusive possession of such public lands. Not only is the plaintiff without title or interest in the lands alleged to be public, but he has not sought to enter or appropriate any of them, nor any part thereof, under any of the

6. Llano v. Llano County, 5 Tex. Civ. App. 132, 23 S. W. 1008.

7. State v. Goodnight, 70 Tex. 682, 11 S. W. 119.

8. Anthony Wilkinson Live Stock Co. v. McIlquam (Wyo. 1905), 83 Pac. 364, 370.

public laws. We think it might be difficult, therefore, upon any recognized principle, for the plaintiff to establish a right in himself to enjoin the alleged acts of the defendant as to those lands. Treating the lands as unappropriated public lands, neither the plaintiff nor the defendant could maintain a suit to restrain the other from allowing his cattle or live stock to graze thereon."[9]

§ 214. **Encroachments and nuisances on highways in general.**—A highway to answer the purpose for which it was created must be free, safe, and convenient.[10] Any unauthorized or unreasonable obstruction therein which impedes the use thereof or renders it more difficult or increases the danger of injury to persons or property, or generally interferes with the public rights, constitutes a public nuisance at common law.[11] And an obstruction may nevertheless be a nuisance though it is not upon the traveled part of the highway,[12] as it is not essential, to render an uncroachment upon a highway, a public nuisance that public travel should be actually obstructed.[13] The fact that there may be sufficient space for the passage of the public is immaterial in the case of an obstruction, as the public have the right to the unobstructed use of the whole street as it was wont to run or as it has been dedicated to its use.[14] Again, the neglect of a statutory duty towards the public may create a nuisance for which the one responsible may be indicted at

9. Per Potter, C. J.

10. Newark v. Delaware, Lack. & W. R. R. Co., 42 N. J. Eq. 196, 7 Atl. 123.

11. First National Bank v. Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. R. 46, 59 L. R. A. 399; Costello v. State, 108 Ala. 45; State v. Mayor of Mobile, 5 Port. (Ala.) 279, 30 Am. Dec. 564; State v. Merritt, 35 Conn. 314; Augusta v. Reynolds (Ga. 1905), 50 S. E. 998; City of Columbus v. Jaques, 30 Ga. 506; Nelson v. Fehd, 104 Ill. App. 114, 67 N. E. 828, affirmed 203 Ill. 120, 67 N. E. 828; Corthell v. Holmes, 88 Me. 376, 380, 34 Atl. 173; Dickey v. Maine Teleg. Co., 46 Me. 483; Wales v. Stetson, 2 Mass. 143; State v. Campbell, 80 Mo. App. 110, 2 Mo. App. Rep. 534; Wilkes-Barre v. Burgunder, 7 Kulp (Pa.), 63; State v. Harden, 11 S. C. 360; Dimmett v. Eskridge, 6 Munf. (Va.) 308.

12. State v. Merritt, 35 Conn. 314; Dickey v. Maine Teleg. Co., 46 Me. 483.

13. Commonwealth v. McNaugher, 131 Pa. St. 55, 18 Atl. 934, 28 Am. & Eng. Corp. Cas. 186.

14. City of Columbus v. Jaques, 30 Ga. 506, 512; Wilkes-Barre v. Burgunder, 7 Kulp (Pa.), 63.

common law and it is not necessary that the statute imposing the duty should in express terms provide for indictment. Thus, it has been so decided in the case of a bridge which a canal company had erected where the canal crossed the highway and which, by the neglect of the company to keep in repair, had become unsafe.[15]

§ 215. **Words "permanent obstruction" construed.**—It is sometimes said that in order to render an obstruction or encroachment upon the highway a public nuisance it must be a "permanent" one. The word permanent in this connection does not embrace the idea of absolute perpetuity or lasting forever. The ordinary acceptation of the word is far from being enforced in declaring a nuisance. It is used in contradistinction to that class of nuisances which are regarded as temporary and made necessary by the exigencies of business or the ordinary use of the highway. It is not necessary that a structure or obstruction should be actually permanent, in the full sense of the word, to render it a nuisance. So a structure sixty-four feet long, twelve feet wide, and six feet high erected upon the street and extending a distance equal to its width from the curb line into the street, with a three-foot railing upon the outside, and used for the purpose of a fair or carnival is sufficiently permanent in its nature to be a nuisance, although not erected for an indefinite period.[16]

§ 216. **Highway not completed or not lawfully established or differing from plans.**—The public has the right in general to go upon any portion of the highway and the fact that an unauthorized obstruction or encroachment is upon a portion of the highway which has not been worked or completed, does not operate to deprive it of its character as a nuisance. The words of the court in a recent case in Missouri are pertinent in this connection. It was there said: "Any encroachment upon any part of the highway, whether upon the traveled part thereof or upon the side, comes clearly within the idea of nuisance. Every person has a right to go over or upon any part of the highway, and the fact that from notions of economy or otherwise, the public authorities having the

15. State v. Morris Canal & Banking Co., 22 N. J. L. 537.

16. City of Richmond v. Smith, 101 Va. 161, 43 S. E. 345, 13 Am. Neg. R. 465.

the same in charge have not seen fit to work the whole of it, does not alter or change the right. A traveler has the right to go anywhere on the right of way outside of the beaten track of the highway if he so chooses, and any obstacle placed in his way of doing so is an infringement and obstruction of a public right, and an annoyance, and therefore a public nuisance." [17] So, where a highway has been established, any private occupation or obstruction thereof is a nuisance although for want of grading by the local authorities, the street has never been passable otherwise than on foot, and although it is not shown that there is or has been travel thereon, by foot passengers or otherwise, which has been actually incommoded.[18] But while the municipal authorities of a city or town may, on complaint of a citizen cause an obstruction to be removed from any public street in actual use by the public, yet where a street exists in the plan only of such city or town, and has not been actually opened, worked by the municipal authorities and used by the public, but on the contrary has been in private occupation for thirty or forty years it is decided that this mode of procedure is not available.[19] Again, where a highway has been established and in use, it is no defense to a prosecution for obstructing it that it was not laid out in accordance with the plan for its construction and that the defendant honestly believed when he erected such obstruction that the highway was not properly located.[20] So, though it might be conceded that the order of commissioner laying out a highway was void for the reason that a third commissioner was not notified of the meeting of the commissioners to make the same, yet it has been declared that, where there is a highway by user and adoption by the commissioners and worked by them as such, to the extent of the use indicated by the location of a fence, as same was proved to have existed for twenty years and as to which a wire fence complained of was an encroachment, the question whether such encroachment was a nuisance from which plaintiff's horse was injured was properly

17. Per Smith, P. J., in State v. Campbell, 80 Mo. App. 110, 2 Mo. App. Repr. 534.

18. Commonwealth v. McNaugher, 131 Pa. St. 55, 18 Atl. 934.

19. Bryans v. Almand, 87 Ga. 504, 13 S. E. 554.

20. Commonwealth v. Dicken, 145 Pa. St. 453; 22 Atl. 1043. See Petersen v. Beha, 161 Mo. 513, 62 S. W. 462.

one for the jury.[21] And it is no defense for obstructing a street, that it was not lawfully established where the defendant was a party to proceedings in which judgment was rendered by a court of competent jurisdiction holding it to be lawfully established and from which judgment the defendant has in no way excepted or appealed.[22] So, one through whose land a highway has been established and ordered to be opened, cannot, after he has presented his claim for damages to the proper authorities and the same is allowed and no appeal taken by him, lawfully obstruct such highway though the notice to the land owner to open the road is irregular or defectice where the proper officials, after giving such notice, actually proceed to open it.[23] And where a public road has been constructed through a person's land, the fact that no compensation therefor has been made to him will not justify him in creating a nuisance by obstructing the same or in any way affect the right of one specially injured by such obstruction to an injunction.[24] Nor will one prosecuted for obstructing a public road or highway be entitled to justify his act by the fact that it is less than the statutory width prescribed in such cases.[25]

§ 217. **Liability of individual creating nuisance in highway.** —One who does or authorizes the doing of an unlawful act upon the highway by which it is obstructed or the free use thereof interfered with, or impeded, or rendered dangerous or which interferes in any way with the rights of the public to use it for the purposes of travel creates a nuisance for which he is liable.[26] And one who

21. Anderson v. Young, 66 Hun (N. Y.), 240, 21 N. Y. Supp. 172, 49 N. Y. St. R. 480.

22. Foster v. Manchester, 89 Va. 92, 15 S. E. 497.

23. Kansas v. Hedeen, 47 Kan. 402, 28 Pac. 203.

24. Draper v. Mackey, 35 Ark. 497; Chapman v. Gates, 54 N. Y. 132.

25. State v. Robinson, 28 Iowa, 514.

26. Nelson v. Fehd, 104 Ill. App. 114, affirmed 203 Ill. 120, 67 N. E. 828; Portland v. Richardson, 54 Me. 46, 89 Am. Dec. 720; Brown v. Watson, 47 Me. 161, 74 Am. Dec. 482; Matthews v. Missouri Pacific Ry. Co., 26 Mo. App. 75; Driscoll v. Carlin, 50 N. J. L. 28, 11 Atl. 482; Tinker v. Railway Co., 157 N. Y. 318, 51 N. E. 1032; Congreve v. Smith, 18 N. Y. 82; Wendell v. Mayor of Troy, 39 Barb. (N. Y.) 329, 337; McDermott v. Conley, 11 N. Y. Supp. 403, 58 Hun. 602m.

has created a nuisance in the highway cannot shelter himself behind the claim that some one else is under a legal liability to remove it. Thus it was so decided where a tramway company created a nuisance by removing the snow from its tracks by a heavy plough and heaping the same up at the sides of the streets and then spreading salt on its tracks, which caused the snow thereon to melt and the mixture run by gravitation from the track to the heaps of snow at the side of the street injuring horses and impeding traffic.[27] Again a defendant who in violation of an express statutory duty, places or causes an obstruction in a public highway, will not be heard to say that he did not anticipate an injury, which was the direct result of his unlawful act, when the person injured was without fault.[28]

§ 218. **Right of individual to maintain action—Special injury necessary.**—In case of a public nuisance affecting the highway, the right of an individual to obtain an injunction is not recognized unless he has suffered some private and material damage or injury differing in kind from that suffered by the public at large.[29] The

27. Ogston v. Aberdeen District Tramways Co. (1897), A. C. 111, 66 L. J. P. C. N. S. 1.

28. Evansville & Terre Haute R. R. Co. v. Carvener, 113 Ind. 51, 14 N. E. 738.

29. Irwin v. Dixon, 9 How. (U. S.) 10, 27; Baker v. Selma Street & S. R. Co., 135 Ala. 552, 33 So. 685; Ward v. City of Little Rock, 41 Ark. 526, 48 Am. Rep. 46; Hogan v. Central Pacific R. Co., 71 Cal. 83, 11 Pac. 876; Wheeler v. Bedford, 54 Conn. 244, 248, 7 Atl. 22; Clark v. Saybrook, 21 Conn. 313; East Tennessee v. G. R. Co. v. Boardman, 96 Ga. 356, 23 S. E. 403; Stufflebeam v. Montgomery, 3 Idaho, 20, 26 Pac. 125; Aurora Electric L. & P. Co. v. McWethy, 104 Ill. App. 479 affirmed, 202 Ill. 218, 67 N. E. 9; Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305; Chicago v. Union Building Assoc., 102 Ill. 379, 40 Am. Rep. 598; McDonald v. English, 85 Ill. 232; O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N. E. 302, 92 Am. St. R. 305; Dantzer v. Indianapolis Union Ry. Co., 141 Ind. 604, 39 N. E. 223, 50 Am. St. R. 343, 34 L. R. A. 769; Strunk v. Pritchett, 27 Ind. App. 582, 61 N. E. 973; Irwin v. Great Southern Teleph. Co., 37 La. Am. 63, 1 Am. Elec. Cas. 709; Brown v. Watson, 47 Me. 161, 74 Am. Dec. 482; Bernbe v. Anne Arundel Co., 94 Md. 321, 51 Atl. 179, 57 L. R. A. 279; Houck v. Wachter, 34 Md. 265, 6 Am. Rep. 332; Robinson v. Brown, 182 Mass. 206, 65 N. E. 377; Stetson v. Faxon, 19 Pick. (Mass.) 147, 31 Am. Dec. 123; Guilford v. Minneapolis & St. P. R. R. Co. (Minn. 1905), 102 N. W. 365; Aldrich v. Wetmore, 52

gist of the action in this class of cases is the private injury and the plaintiff must allege and prove some special damage different in kind from that suffered in common with the public.[30] When this is shown he will be entitled to an injunction restraining such nuisance,[31] and may recover damages from the one causing the

Minn. 164, 53 N. W. 1072; Dawson v. St. Paul Fire Ins. Co., 15 Minn. 136, 2 Am. Rep. 109; Baker v. McDaniel, 178 Mo. 447, 77 S. W. 531; George v. Peckham (Neb., 1905), 103 N. W. 664; Adams v. Popham, 76 N. Y. 410; Moudle v. Toledo Plow Co., 6 Ohio N. P. 294; Knowles v. Pennsylvania R. R. Co., 175 Pa. St. 623, 34 Atl. 974, 52 Am. St. R. 860; Parsons v. Hunt (Tex. Civ. A., 1904), 81 S. W. 120; Baxter v. Winoski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84; Wilson v. West & Slade Mill Co., 28 Wash. 312, 68 Pac. 716; Keystone Bridge Co. v. Summers, 13 W. Va. 476, 485; Zettel v. West Bend, 79 Wis. 316, 48 N. W. 379, 24 Am. St. R. 715; Carpenter v. Mann, 17 Wis. 155.

"It is familiar law that the process of injunction cannot be availed of by a private citizen to abate a purely public nuisance, from which he suffers no special or peculiar injury of a continuing nature, for which an action at law will afford him no adequate remedy or redress, and that for a single injury capable of estimation in damages, although inflicted in the perpetration of a public wrong, compensation must be sought in a court of law. . . . It is not enough to confer jurisdiction upon equity that the plaintiff has suffered damages special or peculiar to himself, and in which the public do not share, but such damages must be of such a character as to be incapable of being measured and compensated in damages. The law is equally well established that if the damages suffered by an individual are of the same nature as those inflicted upon the public at large, they are not rendered special and peculiar, within the meaning of the above mentioned rule, by the fact that they exceed the latter in degree. In order to be included within the rule they must differ from the latter in kind." George v. Peckham (Neb., 1905), 103 N. W. 664, 666, per Ames. C.

The erection of a platform scale in a street of a city cannot be enjoined in a proceeding by an individual unless he shows some special injury. Grant v. Defenbaugh, 91 Ill. App. 618.

30. Smith v. McDonald, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393. See Baker v. Selma Street & S. R. Co., 135 Ala. 552, 33 So. 685.

The complaint must show by proper averment that the plaintiff will suffer some injury from the nuisance which is in its nature special and peculiar to him and different in kind from that to which the public is subjected. Harniss v. Bulfitt (Cal., 1905), 81 Pac. 1022, decided under Cal. Civ. Code, § 3493.

31. First National Bank v. Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. R. 96, 59 L. R. A. 399; Howard v. Hartford St. Ry. Co., 76 Conn. 174, 56 Atl. 506; McDonald v. English,

same.[33] As is said in a West Virginia case: "If the right of the public to the use of a highway is clear, and a special injury is threatened by an obstruction of the highway, and this special injury is serious, reaching the very substance and value of the plaintiff's estate, and is permanent in its character, a court of equity by an injunction ought to present such a nuisance." [33]

§ 219. **Same subject—Continued.**—To constitute special damage there must be an invasion or violation of some private right of the individual, as distinguished from the public right which a party has of using a public highway in common with the rest of the public.[34] It is not, however, essential to the right of an individual to maintain an action that the special injury sustained by him be direct, a consequential injury being sufficient.[35] And it has been declared that the extent of the injury which an individual must sustain to entitle him to maintain such an action is not generally considered very important, it being said though that a substantial

85 Ill. 232; Strunk v. Pritchett, 27 Ind. App. 582, 61 N. E. 973; Venard v. Cross, 8 Kan. 248; Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072; Canton Cotton Warehouse Co. v. Potts, 69 Miss. 31, 10 So. 448; Smith v. Putnam, 62 N. H. 369; Wakeman v. Wilbur, 147 N. Y. 657, 42 N. E. 341.

32. Staples v. Dickson, 88 Me. 362, 34 Atl. 168; Viebahn v. Crow Wing County Comm'rs (Minn., 1905), 104 N. W. 1089; Smith v. Putnam, 62 N. H. 369. See sections following, herein.

A tenant of city premises, although he has no estate in the land, is the owner of its use for the term of his lease and can recover damages for any injury to such use, caused by the erection and maintenance of a public nuisance in the street adjacent to the premises. Bentley v. Atlanta, 92 Ga. 623, 18 S. E. 1013.

A town which sustains a special damage by a public nuisance affecting a highway which it is obligated to maintain may recover damages from the one who maintains the same. Charlotte v. Pembroke Iron Works, 82 Me. 391, 19 Atl. 902, 8 L. R. A. 828.

A demand to abate a nuisance upon the highway is not necessary to enable a person injured thereby to maintain an action for damages. Coats v. Atchison, T. & S. F. Ry. Co. (Cal., 1905), 82 Pac. 640.

33. Keystone Bridge Company v. Summers, 13 W. Va. 476, 485, per Green, President. See Mohawk Bridge Company v. Utica & Schenectady R. R. Co., 6 Paige Ch. (N. Y.) 555.

34. Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072.

35. Baxter v. Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84.

and not merely a nominal injury must be inflicted.[36] And though in an action by an individual to abate a public nuisance consisting of an obstruction in a highway, there is no positive averment in the complaint of any special injury to the plaintiff differing from that sustained in common with the public, yet it has been decided that where the essential fact appears by plain and necessary implication, and there is no special demurrer raising any objection to the pleading, the pleading will be upheld upon a motion for judgment on the pleading which is made at the beginning of the trial.[37] In Louisiana a distinction is made in those cases where the soil of a public road belongs to the owner of the land on which it is made. In such a case it has been decided that where a nuisance exists upon the road in front of a person's premises which only affects him in the same manner as the rest of the public, yet he is entitled to his remedy therefor as he is merely protecting his own private interests which he has by reason of the ownership of the soil, and that these differ from the interests of the public at large.[38] And it has been decided that mandamus proceedings may be brought by a private citizen to compel the proper authorities to remove an obstruction in a city street, which constitutes a nuisance, without showing any special interest or injury on the part of such citizen.[39] So where a railroad company has illegally encroached upon the highway so as to create a public nuisance mandamus may be maintained by a private individual to compel the restoration of the highway to "its former state or to such state as not to have its usefulness impaired."[40]

36. Wakeman v. Wilbur, 147 N. Y. 657, 42 N. E. 341.

37. Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106.

38. Bradley v. Pharr, 45 La. Ann. 426, 12 So. 618, 19 L. R. A. 647, so holding in the case of the construction of a private railway on a public road.

39. People v. Keating 168 N. Y. 390, 61 N. E. 637. See, also, Brokaw v. Highway Comm'rs, 130 Ill. 482, 22 N. E. 596, distinguishing Yorktown v. People, 66 Ill. 339; Patterson v. Vail, 43 Iowa, 142; People v. Mayor of New York, 59 How. Prac. (N. Y.) 277.

That mandamus will not lie where there is a remedy by indictment, see White v. Highway Comm'rs, 95 Mich. 288, 54 N. W. 875.

40. People v. Northern Central Ry. Co., 164 N. Y. 289, 58 N. E. 138.

§ 220. **When special injury exists—Particular instances.**—An owner of land who erects in front of his building columns which encroach upon the sidewalk, creates a public nuisance to enjoin which a bill in equity may be maintained and an owner of adjacent property who is thereby injured in his easement of view or prospect sustains an injury different in degree and character from that sustained by the general public and may maintain a bill in equity to enjoin such nuisance.[41] And where by the standing of horses and wagons in front of the adjoining premises both upon the sidewalk and the street so that persons must turn out into the street to get around such obstruction, it was declared that it might well be inferred that custom might be diverted from the plaintiff's place of business by the inconvenience of his customers in having to pass such obstructions so as to constitute such a special injury as to give him a standing in court for redress.[42] So where a bookseller having a shop by the side of a public thoroughfare suffered loss in his business in consequence of travelers having been diverted from the thoroughfare by an unauthorized obstruction across it for an unreasonable time, it was decided that this was a damage sufficiently of a private nature to form the subject of an action.[43] So if persons, though under the authority of a charter, build a bridge over a canal constructed by them at the point where it intersects the highway and the bridge was either originally rotten and unsafe or becomes so subsequently, it is a public nuisance in the highway and one who sustains a special injury as a result thereof will be entitled to recover damages.[44] And where a public road leading to a ferry maintained by the plaintiff was obstructed, it was decided that there was such a special injury to him as would entitle him to an injunction against its continuance.[45] So it has been decided that the right given by statute to flow lands by proceedings under a mill dam act, confers no authority to create a

41. First National Bank v. Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. R. 46, 59 L. R. A. 399.

42. Flynn v. Taylor, 53 Hun (N. Y.), 167, 26 N. Y. St. R. 649, 6 N. Y. Supp. 96.

43. Wilkes v. Hungerford Market, 2 Bing. N. C. 281.

44. Pennsylvania & Ohio Canal Co. v. Graham, 63 Pa. St. 290, 296, 3 Am. Rep. 549. See Manley v. St. Helen's Canal & Ry. Co., 2 Hurls. & Norm. 840. As to railroad bridges, see § 250, herein.

45. Draper v. Mackey, 35 Ark. 497.

public nuisance by overflowing or obstructing the highway and that one who is deprived of his right of access to and egress from his property thereby, sustains a special injury entitling him to maintain an action therefor.[46] And where there has been a material deterioration in value of a person's property different in extent and manner from that which is sustained by the public at large, an action may be maintained by such person to abate the nuisance.[47]

§ 221. **Same subject—Continued.**—Where a person who had been using a certain road for the purpose of drawing logs over it was, by reason of an obstruction in the form of a fence therein, compelled for several days to take another and much longer route to his pecuniary damage, and it also appeared that he was obliged at other times to clear the road from drifts of snow and that in some other respects he was put to expense in the use of the road, it was decided that he sustained such a peculiar and private injury as would entitle him to maintain an action to abate the nuisance.[48] As a general rule, however, the mere fact that a person is obliged by reason of a nuisance in the highway to travel by a longer or more circuitous route, does not show any special injury which will enable him to maintain such an action himself.[49] Nor is an injury such as is essential established by the fact that a person is more frequently inconvenienced than others as proof of this fact shows, not an injury different in kind, but one merely different in extent.[50] And where, in an action by an individual to abate a nuisance

46. Venard v. Cross, 8 Kan. 172.

47. Whaley v. Wilson, 112 Ala. 627.

48. Wakeman v. Wilbur, 147 N. Y. 657, 42 N. E. 341, 71 N. Y. St. R. 266. Compare George v. Peckham (Neb., 1905), 103 N. W. 664.

49. Guttery v. Glenn, 201 Ill. 275, 66 N. E. 305; Houck v. Wachter, 34 Md. 265, 6 Am. Rep. 332; Zettel v. West Bend, 79 Wis. 316, 48 N. W. 379, 24 Am. St. R. 715. But see Brown v. Watson, 47 Me. 161, 74 Am. Dec. 482, holding where one returning home with a loaded team was stopped by obstructions placed in the highway and compelled to take a more circuitous route, that he was entitled to recover damages from the person who placed the obstruction there.

50. San Jose Ranch Co. v. Brooks, 74 Cal. 463, 16 Pac. 250; Gilbert v. Greeley S. L. & P. R. Co., 13 Colo. 501, 22 Pac. 814, 40 Am. & Eng. R. Cas. 800.

consisting of an obstruction in the highway, it was alleged that, by reason of the obstruction, visitors to the town were unable to readily and easily see and determine the location of the hotel and restaurant of the plaintiff and became the guests of other hotels and restaurants, and that in consequence thereof the plaintiff had suffered damage, it was decided that such allegations did not show an injury different in kind and character from that suffered by the public or other business men in the vicinity.[51] Again, it has been decided that a railroad company does not sustain such a special injury on account of annoyance to its passengers from a nuisance caused by the assembling in the street near the depot of expressmen and hotel runners who, by reason of the manner in which they conduct their business, are a nuisance both to the passengers and the public, as will entitle it to maintain a bill to enjoin such nuisance.[52]

§ 222. **Injury to access or egress.**—One who owns property abutting on a street has not only the right in common with the public of using the street from end to end for the purpose of passage, but also has the individual right of free and convenient egress from and ingress to his property which is a private and personal right unshared by the community, and if taken away or materially impaired by an unauthorized obstruction of the highway such owner sustains a special injury different in character from that sustained by the public, which will entitle him to maintain an action to enjoin the continuance of the same.[53] It is not necessary that all

51. Stufflebeam v. Montgomery, 3 Idaho, 20, 26 Pac. 125.

52. Pittsburgh, Ft. W. & C. R. Co. v. Cheevers, 44 Ill. App. 118.

53. Goggans v. Myrick, 131 Ala. 286, 31 So. 22; Hargrd v. Hodgdon, 89 Cal. 623, 26 Pac. 1106; Hubbard v. Deming, 21 Conn. 356; O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N. E. 302, 92 Am. St. R. 305; Dantzer v. Indianapolis Union Ry. Co., 141 Ind. 604, 39 N. E. 223, 34 L. R. A. 769, 50 Am. St. R. 343; Venard v. Cross, 8 Kans. 172; Dyche v. Weichselbaum, 9 Kan. App. 360, 58 Pac. 126; Sutherland v. Jackson, 32 Me. 80; Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072; Brokkan v. Minneapolis & St. L. R. Co., 29 Minn. 41, 11 N. W. 124; Wallace v. Kansas City & Southern R. Co., 47 Mo. App. 491; Kalteyer v. Sullivan, 18 Tex. Civ. App. 488, 46 S. W. 288.

A railroad company may maintain a bill in equity to enjoin the continuance of a nuisance consisting of an obstruction in the highway by which access to its property is ma-

access be cut off to entitle him to this remedy.[54] Nor need the obstruction be continuous and uninterrupted, it being sufficient if it is only occasional and continued for a few hours at a time.[55] And the fact that other abutters may sustain a similar injury does not render their injury one in common with the public or deprive an abutting owner of his right to maintain an action for damages against the one creating the nuisance.[56] And though the municipality, and not the abutter, owns the fee to the street, he may, nevertheless, avail himself of such a remedy.[57] In the application of the rule as to such a remedy in case of an injury to access and egress it has been decided that the construction of a round house and machine and repair shops at the end of an alley, which was so narrow that it did not permit of the turning in it of a vehicle drawn by a beast of burden by which all access to a person's property from the rear was cut off from one street, created a public nuisance and that the owner of the property thereby sustained such a special injury as would entitle him to maintain an action.[58]

§ 223. **Loading and unloading goods.**—Among the few limitations upon the right of the public to the free and unobstructed use of the highway is that of the right of the owner or occupant of premises which abut thereon to make a reasonable use of the highway in front of his premises for the purpose of loading or unloading goods or merchandise used in connection with a business conducted by him. The use in such cases must be a reason-

terially impaired. Pennsylvania S. V. R. Co. v. Reading Paper Mills Co., 149 Pa. St. 18, 24 Atl. 205. As to obstruction to access and egress by railroad tracks, structures or cars, see §§ 247-250, herein.

54. Aldrich v. Wetmore, 52 Minn. 164, 53 N. W. 1072.

55. Hayes v. Chicago, St. P., M. & O. R. Co., 46 Minn. 349, 49 N. W. 61, so holding where cars standing on a crossing for several hours at a time produced such an injury.

56. O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N. E. 302, 92 Am. St. R. 305.

57. Alabama & V. G. R. Co. v. Bloom, 71 Miss. 247, 15 So. 72. As to municipal liability for nuisance in highway, see § 264, herein. As to municipal liability generally, see §§ 353-358, herein.

58. Kaje v. Chicago, St. P., M. & O. Ry. Co., 57 Minn. 422, 59 N. W. 493, 47 Am. St. R. 627. See Strunk v. Pritchett, 27 Ind. App. 582, 61 N. E. 973.

able and necessary one, both as to the extent to which the highway is used and the duration of time the use continues.[59] So in a late case in Illinois it is said in this connection: "Abutters upon a public street may use the sidewalks in front of their premises for the purpose of loading and unloading goods, merchandise or other like articles in which they may deal or use, but the sidewalks belong to the public and the public primarily have the right to the free and unobstructed use thereof, subject to reasonable and necessary limitations, one of which is the right of an abutting owner to temporarily obstruct the walk by loading or unloading goods, wares or merchandise when such obstruction is reasonably necessary. Such obstruction, must, however, be both reasonable as to the necessity therefor and temporary in point of time. The prior and superior right of passage is possessed by the public. A merchant or businessman cannot be permitted to so conduct his business of receiving and delivering the commodities in which he deals, as that the sidewalks shall be substantially appropriated to the transaction of his affairs. A business which has reached that magniture cannot be accommodated by the appropriation of the public sidewalks to its purposes, but the proprietor must enlarge his place of business, procure another location which will meet its demands, or otherwise provide for the transaction of his business in such manner that the public will not be asked to submit to other than reasonable and merely temporary obstructions of the public way."[60] And in a recent case in New York it is declared that: "It is true that persons engaged in business in a city have the right to use the streets and sidewalks for the purpose of unload-

59. Gerdes v. Christopher & Simpson A. I. & F. Co., 124 Mo. 347, 25 S. W. 557; Holsey v. Rapid Transit Street R. Co., 47 N. J. Eq. 380, 20 Atl. 859; Flynn v. Taylor, 127 N. Y. 596, 28 N. E. 418, 40 N. Y. St. R. 187, 14 L. R. A. 556; Welsh v. Wilson, 101 N. Y. 254, 4 N. E. 633, 54 Am. Rep. 698; Tuomey v. O'Reilly, 3 Misc. R. (N. Y.) 302, 22 N. Y. Suppl. 930, 52 N. Y. St. R. 119; Jochem v. Robinson, 66 Wis. 638, 29 N. W. 642, 57 Am. Rep. 298; Attorney-General v. Brighton & Hove Co-op. Supply Ass'n, 69 Law J. Ch. 204, 81 Law T. (U. S.) 702 [1900], 1 Ch. 276; King v. Russell, 6 East, 427.

60. Garibaldi v. O'Connor, 210 Ill. 284, 287, 71 N. E. 379, 66 L. R. A. 73. See, also, as to procuring another location, People v. Cunningham, 1 Denio (N. Y.), 524, 43 Am. Dec. 709; King v. Russell, 6 East, 427.

ing and loading goods that have to be taken into and from their buildings and storehouses. It is also true that highways and sidewalks may be temporarily blocked when necessary." The court then referred to the decision in Welsh v. Wilson,[61] holding that a merchant had the right to place skids across the sidewalk for the purpose of loading and unloading goods and said: "While we approve fully of the conclusion reached in that case under the facts there disclosed, it should not be understood as authorizing the practical obstruction of a street for the greater portion of the time, or as establishing a hard and fast rule which must control in all cases. Places and circumstances widely differ. That which would but slightly inconvenience the public in one place, might in another very seriously impede and discommode travelers. The use by a merchant of a back street but little traveled might be reasonable and justified, while a like use of a main thoroughfare constantly crowded with passing people would become at once unreasonable and a nuisance that could not be tolerated. Reasonable use therefore is ordinarily a question of fact depending upon its being temporary and necessary, having reference to time, place and circumstances."[62] If, in this class of cases, an individual sustains an injury, by reason of such a nuisance, which differs in kind from that sustained by the public at large, he will be entitled to maintain a private action therefor. Thus it was decided that the proprietor of a large retail store sustained an injury of such a character where by reason of the continuous obstruction of the neighboring sidewalk for several hours a day travel was diverted to the other side of the street.[63]

§ 224. **Same subject—Fact that business lawful or use necessary may be immaterial.**—Where a person in carrying on a business obstructs the highway, in the loading and unloading of goods, so that the right of the public to use the street cannot be exercised

61. 101 N. Y. 254.

62. Murphy v. Leggett, 164 N. Y. 121, 125, 126, 58 N. E. 42, per Haight, J. See, also, upon question of what is reasonable use, Gerdes v. Christopher & Simpson A. I. & F. Co., 124 Mo. 347, 25 S. W. 557.

63. Flynn v. Taylor, 127 N. Y. 596, 40 N. Y. St. R. 187, 28 N. E. 418, 14 L. R. A. 556. As to necessity and existence of special injury in cases of nuisance affecting highway, see §§ 218-221, herein.

to the extent which the law requires, the fact that the business is a lawful one and that the use of the street is only such as is reasonable and necessary for the proper conduct of the business, is immaterial. The private right of use in such case must give way to the right of the public and so long as it continues in conflict with the latter right a public nuisance exists. The following words of the court in a recent English case are pertinent in this connection: "The defendants say that they are carrying on a lawful business, and that they are carrying it on in a way which is so far reasonable that it is really necessary, if they are to carry on their business here at all, that they should do very much as they are doing. It seems to me, that if we look only at the carrying on of their business, that what they are doing is perfectly reasonable. They have a large business, there is a great deal of loading and unloading to be done, they have a number of carts, and they do not dawdle, as far as I can see—that is to say, each cart is loaded and unloaded with fair despatch; there is no complaint about that, and therefore we have to consider what is the consequence of their reasonable exercise of their rights coming into conflict with the rights of the public to use this highway. Now, I take the law to be that which was laid down long ago, and I believe with perfect correctness in Rex v. Russell.[64] The facts there were not quite the same as here; but what I am going to read appears to me to express in better language than I could call up for the time what the law is, and it has the great advantage of having stood the test of the best part of a hundred years of criticism. What the court said was: 'That it should be fully understood that the defendant could not carry on any part of his business in the public street to the annoyance of the public. That the primary object of the street was for the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance. That if the nature of the defendant's business was such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises, or remove his business to some more convenient spot.' I take that to be the law. In substance that comes to this—that in case of doubt or

64. 6 East, 427.

difficulty the private, reasonable right to carry on one's business must give way to the public right of using the street. If the public right of using the street is so obstructed, in fact, that that right cannot be used to the extent which the law requires, then the private right must give way; and to my mind it is not an answer to say that the defendants can go on using this street in a way that is reasonable, having regard to their interests alone." [65]

§ 225. **Same subject—Application of rules.**—In the application of the rule that an abutter may make reasonable use of the highway for the purpose of loading and unloading goods and merchandise used in connection with his business, it has been decided that a manufacturing company has the right to make reasonable use of the streets for the deposit of their manufactured goods, for the purpose of loading and unloading them though not directly authorized by an ordinance of the city. But it has no right to make a permanent use of the streets for the purpose of storing its property or to make such temporary use as will unreasonably interfere with travel.[66] And where a person who carried on a large retail business used for the purpose of such business a large number of vans and carts which were loaded and unloaded from their premises, and these vehicles blocked up one-half of the street during a great part of the day, it was held that such use of the highway was not a reasonable one but constituted a nuisance which ought to be restrained.[67] And where the proprietors of a distillery were in the habt of delivering their "slops" through pipes into casks placed in wagons, and carts which were standing in the street in front of the distillery and the teams and wagons of the purchasers were accustomed to collect there in great numbers to receive and take away the

65. Attorney-General v. Brighton & Hove Co-op. Supply Assoc., 69 Law J. Ch. 204 (1900), 1 Ch. 276, 81 Law T. (U. S.) 762, per Lindley, M. R. See, also, People v. Cunningham, 1 Denio (N. Y.), 524, 43 Am. Dec. 709.

The fact that a business or trade which is a nuisance is lawful is immaterial. See § 99, herein.

66. Gerdes v. Christopher & Simpson A. I. & F. Co., 124 Mo. 347, 25 S. W. 557.

67. Attorney-General v. Brighton & Hove Co-op. Supply Assn., 69 Law J. Ch. 204 (1900), 1 Ch. 276, 81 Law T. (N. S.) 762.

article, and in consequence thereof and of the strife and disorderly conduct of the drivers in their endeavors to obtain priority, the street was obstructed and rendered inconvenient to those passing thereon, it was held that a nuisance was thereby created of which the proprietors were guilty and the fact that the business was lawful was declared to be no justification. The court also said in this case that if the necessities of the business were such as to require the assembling of the wagons, the defendants must either enlarge their plant or remove elsewhere.[68]

§ 226. **Skids or platforms for loading or unloading merchandise.**—The use of skids across the sidewalk for the purpose of loading and unloading goods used in connection with a business conducted by an abutter, is not necessarily a nuisance in the absence of some express provision of law which makes it such.[69] A use of this character, if reasonable, may be justified by the necessity of the business. And it has been declared that the necessity sufficient to justify it need only be reasonable.[70] So it has been decided that a person may place skids over the sidewalk in front of his store for the purpose of unloading heavy barrels of sugar, though there is an alley at the back of his store, where it appears that the unloading could not be accomplished in such alley without great inconvenience.[71] And it has been decided that the use of skids extending from a railroad car to a warehouse, where there is sufficient room on the other side of the street for travel to pass, is not a nuisance where the duration of their use is reasonably short.[72] An abutter cannot, however, appropriate the highway to the purposes of his private business to the exclusion of the rights of the public. His use must be a reasonable one, having regard to the public convenience and the necessities of travel. So the continuous obstruction of a sidewalk by skids for several hours each day will be a nuisance which may be restrained.[73] And a platform in front of a

68. People v. Cunningham, 1 Denio (N. Y.), 524, 43 Am. Dec. 709.

69. Welsh v. Wilson, 101 N. Y. 254, 4 N. E. 633, 54 Am. Rep. 698.

70. Jochem v. Robinson, 72 Wis. 199, 39 N. W. 383, 1 L. R. A. 178.

71. Jochem v. Robinson, 72 Wis. 199, 39 N. W. 383, 1 L. R. A. 178.

72. Mathews v. Kelsey, 58 Me. 56, 4 Am. Rep. 248.

73. Callanan v. Gilman, 107 N. Y. 36, 14 N. E. 264, 1 Am. St. R. 831.

business place, within the stoop line prescribed by the municipal authorities and used in connection with the loading and unloading of goods, has been held not to be a nuisance *per se*, though it may become a nuisance if the use is unreasonable.[74] Again, it has been decided that a platform built in a private alley at the rear of a store for convenience in transferring goods, cannot be assumed as a matter of law to be an obstruction or a nuisance, it being declared that such an alley is not a public highway and an obstruction therein is not a public wrong though it may be a private nuisance.[75]

§ 227. **Exposure of wares for sale—Storing goods in highway— Show cases.**—A business man cannot obstruct the highway by using it for the purpose of exposing his wares for sale.[76] Nor can it be obstructed by using it as a storage ground for goods, merchandise or other personal property of an individual,[77] as such a use creates a public nuisance.[78] So the obstruction of the pavements of a street as a storage ground for slabs used in a slate factory, where such obstruction is not a temporary one for the purpose of conveying material to or manufactured goods from the factory, is unlawful and constitutes a public nuisance and renders the one so using the pavements responsible for injuries occasioned by his conduct to any person lawfully using the highway and who is not himself at fault.[79] And where the light is obstructed from a

See Wynn v. Yonkers, 80 App. Div. (N. Y.) 277, 80 N. Y. Suppl. 257.

74. Murphy v. Leggett, 164 N. Y. 121, 58 N. E. 42, affirming 29 App. Div. 309, 51 N. Y. Suppl. 472.

75. Bagley v. People, 43 Mich. 355, 5 N. W. 415, 38 Am. Rep. 192.

76. Rex v. Carlile, 6 Car. & P. 636.

77. Marine Ins. Co. v. St. Louis, I. M. & S. R. Co., 41 Fed. 643, 43 Am. & Eng. R. Cas. 79.

78. Sullivan v. McManus, 19 App. Div. (N. Y.) 167, 45 N. Y. Suppl. 1079.

No power was given to common council of New York City to grant a permit to an individual to store a wagon in a street of the city. Therefore a permit conferred no right, and a wagon stored in a street in pursuance thereof was held to be a nuisance for which the city and its licensee were both responsible. Cohen v. New York, 113 N. Y. 532, 21 N. E. 700, 23 N. Y. St. R. 509, 10 Am. St. R. 506, 4 L. R. A. 406, rev'g 43 Hun (N. Y.), 345, 6 N. Y. St. R. 532.

79. Rachmel v. Clark, 205 Pa. St. 314, 54 Atl. 1027, 14 Am. Neg. R. 208, so holding where a boy was injured by a slab falling upon him while leaning against the slabs.

storekeeper's windows and premises by a show case and sign maintained by the proprietor of an adjoining store in front of his premises, the former will be entitled to an injunction against the continuance of such obstruction.[80] And where a city having notice of an unlawful obstruction of the sidewalk by the maintenance of a show case thereon by a storekeeper, allows it to remain, it has been decided that it will be liable to one who, while in the exercise of due care, is injured by its falling upon him.[81]

§ 228. **Market places.**—A market place erected in a city street and which interferes with commodious passage through such street is a nuisance,[82] which may be enjoined at the suit of one sustaining a special injury by its maintenance.[83] And a city may be enjoined from using or authorizing, or taking pay or fees for, such use of the streets of the city.[84] And it has been decided that the legislature has not the power, under the constitution of the State of New Jersey, to authorize a market to be held in a public street of a city, without providing compensation to the proprietors of the contiguous lands who own to the centre of such street, as such a use constitutes an additional burden for which the abutting owner must be compensated.[85]

80. Hallock v. Scheyer, 33 Hun (N. Y.), 111. See, also, Lavery v. Hannigan, 52 N. Y. Super. Ct. 463.

81. Wells v. Brooklyn, 9 App. Div. (N. Y.) 61, 41 N. Y. Suppl. 143. As to liability of municipality for failure to remove or abate a nuisance, see §§ 357, 358, herein.

82. State v. Mayor of Mobile, 5 Port. (Ala.) 279, 30 Am. Dec. 564; McDonald v. Newark, 42 N. J. Eq. 136, 7 Atl. 855.

83. McDonald v. Newark, 42 N. J. Eq. 136, 7 Atl. 855.

Where access to abutting property is materially impeded by a market so maintained the owner of such property suffers a special injury sufficient to entitle him to an injunction. Richmond v. Smith, 148 Ind. 294, 47 N. E. 630.

84. McDonald v. Newark, 42 N. J. Eq. 136, 7 Atl. 855.

A city is properly a defendant in a proceeding to enjoin the maintenance of such a market where the municipal authorities are required by statute to remove public nuisances from the street and are given the power to control, regulate and preserve them for the use of the public. Herrick v. Cleveland, 7 Ohio C. C. 470.

85. State v. Laverack, 34 N. J. L. 201.

§ 229. **Deposit of building materials and earth in street.**—An owner of property abutting on a city street who has occasion to build and for that purpose it is necessary to dig cellars, may, in the absence of any provision by statute or regulation by the municipal authorities which is controlling, deposit the building materials and earth within the limits of the highway, provided he takes care not improperly to obstruct the same and to remove them within a reasonable time.[86] So a temporary use of the street under such circumstances for the deposit of mortar boxes or the making of mortar beds is not a nuisance.[87] And though an abutting owner might place them in his yard or garden, he is not bound to do so at the peril of injury to his shrubbery or plants.[88] Encroachments of such a character must, however, be reasonable, not continued longer than necessary and must be properly guarded and protected in order to secure the public against danger.[89] And the fact that a city council has granted a license to one to use a street for the deposit of building material, does not suspend or abrogate the duty of the city to exercise reasonable care to keep the highway in a safe condition.[90]

§ 230. **Excavations—Generally.**—The right of the public to the use of the highway being subject to such incidental and temporary obstructions as are reasonable and which manifest necessity may require, it may be stated that in the absence of any statutory or municipal regulation in respect thereto, certain excavations, as for instance those which are necessary to building operations and

86. Costello v. State, 108 Ala. 45, 18 So. 820, 35 L. R. A. 303; Johnson Chair Co. v. Agresto, 73 Ill. App. 384; O'Linda v. Lothrop, 21 Pick. (Mass.), 292; Pueschell v. Sutherland, 79 Mo. App. 459, 2 Mo. A. Rep. 473; Stuart v. Havens, 17 Neb. 211, 22 N. W. 419; Cohen v. New York, 113 N. Y. 532, 21 N. E. 700, 23 N. Y. St. R. 509, 10 Am. St. R. 506, 4 L. R. A. 406; Commonwealth v. Passmore, 1 Serg. & R. (Pa.) 219; Hundhausen v. Bond, 36 Wis. 29.

Common council may authorise such an obstruction. People v. Mayor of New York, 59 How. Prac. (N. Y.) 277.

87. Strauss v. City of Louisville, 108 Ky. 155, 55 S. W. 1075.

88. Loberg v. Amherst, 87 Wis. 634, 58 N. W. 1048, 41 Am. St. R. 69.

89. Chicago City v. Robbins, 2 Black (U. S.), 418, 424, 17 L. Ed. 298; Hundhausen v. Bond, 36 Wis. 29.

90. Grant v. Stillwater, 35 Minn. 242, 28 N. W. 660.

the repair of houses and buildings, may be made in a highway and are not necessarily nuisances though they may become such under some circumstances.[91] The making of excavations, however, in the streets of a city is ordinarily a matter within the control and regulation of the municipal authorities and in such cases a permit is generally required. Where this condition exists it would seem that an excavation made by one without the requisite authority, would be a nuisance.[92] But though the right to make an excavation may be recognized and does in fact exist, yet certain duties toward the public are imposed upon the one making it. Though the excavation may not in itself be a nuisance, yet it may be so maintained as to become one. It must be properly protected. It should only take up so much of the highway, and should be maintained only for such a length of time as is reasonably necessary to affectuate the purposes for which it was intended. So an excavation in the street or an area in the sidewalk if left open and unprotected so that it is dangerous to the traveling public, becomes a nuisance.[93] The obligation also rests upon one who has made an excavation in the highway to restore it to its former safe condition and the failure to do so will create a nuisance.[94] In case a special injury is sustained by reason of a nuisance of this character, he may recover therefor from the one liable. So where an abutting owner on a street which had been rendered impassible by reason of a nuisance consisting of an excavation made by the city, sustained an injury to the rental value of his property, it was held that he might recover therefor.[95] And it has been decided that the liability of one who, without authority, makes an excavation in a highway, is not discharged or affected by the fact that he provided a sufficient covering therefor which

91. Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590. See Beatty v. Gilmore, 16 Pa. 463, 55 Am. Dec. 514.

92. Robinson v. Smith, 25 Mont. 391, 65 Pac. 114; Congreve v. Standard Oil Co., 54 Hun (N. Y.), 44; Irvin v. Fowler, 5 Rob. (N. Y.) 482.

93. Chicago City v. Robbins, 2 Black (U. S.), 418, 424, 17 L. Ed. 298; Tomle v. Hampton, 28 Ill. App. 142, affirmed in 129 Ill. 379, 21 N. E. 800; Condon v. Sprigg, 78 Md. 330, 28 Atl. 395; Irwin v. Sprigg, 6 Gill. (Md.) 200; Stuart v. Havens, 17 Neb. 211, 22 N. W. 419.

94. Robinson v. Mills, 25 Mont. 391, 65 Pac. 114.

95. Van Siclen v. New York, 61 N. Y. Supp. 555, 32 Misc. 403.

was destroyed by the act of a wrongdoer as he is bound at his peril to keep it so covered that the highway will be as safe as it was before.[96] Again, though an excavation is not upon the highway but on the abutting property, yet it may be so close thereto that by reason of the want of proper safeguards one passing along the highway may, in the exercise of ordinary care, fall into it. In such a case it is also held to be a nuisance *per se*.[97]

§ 231. **Vaults and excavations under sidewalks—Coal holes, openings, etc.**—The construction by an abutting owner without authorization by the proper authorities, of a vault under the sidewalk, though it is provided with a proper covering, as in the case of a coal hole, is in some cases, especially in New York, held to be an unlawful appropriation by the individual of the highway to a purpose foreign to that for which it was dedicated, and therefore a nuisance.[98] So in a decision in New York it was held that a coal hole in a sidewalk was a nuisance. The court said: "The public are entitled to an unobstructed passage upon the streets, including the sidewalks of the city, but a structure such as that proved in this case was an obstruction. It was sufficient for the plaintiff to prove that, in passing along the sidewalk he was injured by this structure which was appurtenant to defendant's premises. It was not necessary to prove negligence. The action was not based upon negligence, but on a wrongful act for which the defendants were responsible. If a permit was material, the effect of it would only be to mitigate the act from an absolute nuisance, to an act involving care in the construction and maintenance, and to justify such a structure it would be necessary not only to plead it, but also to allege and prove a compliance with its terms, and that the structure was properly made and maintained, to secure the same safety to the public, that the sidewalk would have secured to it.'[99] It would seem, however, that such an

96. Congreve v. Morgan, 18 N. Y. 84, 72 Am. Dec. 495. See Congreve v. Smith, 18 N. Y. 179.

97. State v. Society for Establishing Useful Manufactures, 42 N. J. Eq. 504. Compare Beck v. Carter, 68 N. Y. 283, 13 Am. Rep. 175.

98. Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603. See Greasten v. Chicago, 40 Ill. App. 607.

99. Clifford v. Dam, 81 N. Y. 52, 56, per Church, Ch. J., affirming 44 N. Y. Super Ct. 391.

excavation as a coal hole, if properly constructed and covered and so maintained that the highway is as safe for passage as it was before and travel is in no way obstructed or the use of highway as such interfered with, would not be a nuisance, in the absence of some express provision of law making it unlawful and a nuisance. And this may be said to be the rule which has the sanction of the authorities.[100] As is said in a case in Michigan: "We are satisfied that at common law the making of such excavation under sidewalks in cities, and the scuttles therein, for such purposes as this was made and used for, were not treated as nuisances in themselves, or in any respect illegal, unless the walk was allowed to remain broken up for an unreasonable length of time, or the work was improperly or unsafely constructed, though it would afterwards become a nuisance if not kept in repair."[101] So it has been decided that a hatchway in a walk leading to a cellar is not a nuisance *per se*.[102] And likewise that an opening in a walk, such as is usual for light and ventilation in front of a cellar window, which was within the line of the doorsteps, and which was only fifteen inches wide and about three feet long was not in itself a nuisance.[103] But where there was an excavation about four feet wide which extended nearly the whole width of the sidewalk and which was covered with wooden doors it was held to be a nuisance, as it was in effect an appropriation of the entire walk, making the easement of the public secondary to the private use of the adjoining owner.[104] In this class of cases the duty rests upon the person maintaining the vault to keep the cover thereto in such a condition that one using the highway with ordinary care and in accordance with its purposes will not be injured, and where he fails to do this he

100. Fisher v. Thirkell, 21 Mich. 1, 4 Am. Rep. 422; Benjamin v. Metropolitan Street R. Co., 133 Mo. 274, 34 S. W. 590; Gordon v. Peltzer, 56 Mo. App. 599; Kirkpatrick v. Knapp, 28 Mo. App. 431; Adams v. Fletcher, 17 R. I. 137, 20 Atl. 263, 33 Am. St. R. 859. See Wharton on Neg. § 816; Thompson on Neg. § 7.

101. Fisher v. Thirkell, 21 Mich. 1, 19, 4 Am. R. 422, per Christiancy, J.

102. Wabash v. Southworth, 54 Minn. 79, 55 N. W. 818. See Williams v. Hynes, 55 N. Y. Super. Ct. 86.

103. King v. Thompson, 87 Pa. St. 365, 30 Am. Rep. 364.

104. Memphis v. Miller, 78 Mo. App. 67, 2 Mo. App. Repr. 235.

will be liable for an injury sustained in consequence thereof.[105] But where a tenant, and not the owner, is in the possession of property in front of which there is an opening to a vault under the sidewalk and the duty rests upon the former to keep the premises in repair, it has been determined that the owner will not be liable.[106]

§ 232. **Same subject—Effect of license.**—License from the municipal authorities, having the power to grant it, to make a coal hole, vault, or other excavation in or under the sidewalk will ordinarily eliminate the question of whether it is a nuisance of itself.[107] So it has been decided that iron doors in a sidewalk over a cellar, which have been maintained for several years with the consent of the city authorities will not render one liable as for the maintenance of a nuisance to one who slips upon them and is injured.[108] The fact, however, that the right may be conferred by a license from the municipal authorities to construct a vault under the sidewalk with an opening thereto in the walk does not relieve the one to whom such license is granted from certain duties and obligations to the public as to its construction and maintenance. There still exists the obligation to construct and maintain it in a proper manner so that the highway be as safe for passage as it was before. He cannot permit it to become, by any act of negligence or carelessness on his part, unsafe for public travel or an impediment thereto and then shelter himself from liability by the fact that its construction and maintenance was licensed.[109] So it has been said that "When permission is given by a municipal authority, to interfere with a street solely for private use and conven-

105. See §§ 230, 232, herein, as to excavations and effect of license.

106. Fisher v. Thirkell, 21 Mich. 1, 4 Am. Rep. 422; Korte v. St. Paul Trust Co., 54 Minn. 530, 56 N. W. 246; Gordon v. Peltzer, 56 Mo. App. 599; Grinnell v. Eames, 32 Law T. R. (N. S.) 835.

107. Korte v. St. Paul Trust Co., 54 Minn. 530, 56 N. W. 246; Clifford v. Dam, 81 N. Y. 52, affirming 44 N. Y. Super. Ct. 391. As to acts authorized by municipality, see §§ 78-80, herein.

108. Sandman v. Baylies, 26 Misc. R. (N. Y.) 692, 56 N. Y. Suppl. 1070, affirming 21 Misc. 523, 47 N. Y. Suppl. 783.

109. Clifford v. Dam, 81 N. Y. 52, affirming 44 N. Y. Super. Ct. 39; Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603. See, also, Benjamin v. Metropolitan Street Ry. Co., 133 Mo. 274, 34 S. W. 590.

ience in no way connected with the public use, the person obtaining such permission must see to it that the street is restored to its original safety and usefulness." [110] Again, whenever vaults under a public street interfere with any public use of the street they become a nuisance and the fact that they were constructed under a permit from the municipal authorities, is held not to protect them.[111]

§ 233. **Buildings encroaching on highway.**—A person has no right to occupy the highway or any part thereof with a private building or structure and any such encroachment will constitute a public nuisance which may be abated.[112] And in the absence of statutory authority conferred upon a municipality it cannot authorize the erection of any structure which encroaches upon the streets.[113] So a building erected on land which has been reserved or dedicated as a public square is a public nuisance which may be abated.[114] And where a barn was erected so close to the sidewalk that its doors, which opened outward, obstructed the sidewalk and were a source of danger to passersby, it was decided that the structure was a public nuisance.[115] And steps of a building encroaching

110. Clifford v. Dam, 81 N. Y. 52, 56, per Church, Ch. J., affirming 44 N. Y. Super. Ct. 391.

111. Patten v. New York Elevated R. Co., 3 Abb. N. C. (N. Y.) 306.

112. First National Bank v. Tyson, 133 Ala. 459, 32 So. 144, 59 L. R. A. 399, 91 Am. St. R. 46; O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N. E. 302, 92 Am. St. R. 305; Valparaiso v. Bozarth, 153 Ind. 536, 55 N. E. 439, 47 L. R. A. 487; Pettit v. Grand Junction, 119 Iowa, 352, 93 N. W. 381; Stetson v. Faxon, 19 Pick. (Mass.), 147, 31 Am. Dec. 123; Wolfe v. Pearson, 114 N. C. 621, 19 S. E. 264.

113. First National Bank v. Tyson, 133 Ala. 459, 32 So. 144, 59 L. R. A. 399, 91 Am. St. R. 46.

The municipal authorities of New York City, though the title to the streets is in the city, have no authority to permit encroachments thereon. Ackerman v. True, 175 N. Y. 353, 67 N. E. 629, construing charter of New York (Laws 1897, vol. 3, p. 18, c. 378, § 49, subd. 3, and Laws 1901, vol. 3, p. 148, c. 466, § 35).

114. Rung v. Shoneberger, 2 Watts. (Pa.) 23, 26 Am. Dec. 95.

The fact that the property was sold by the city will not relieve a building erected thereon of its character as a nuisance where the sale was illegal. Commonwealth v. Rush, 14 Pa. 186.

115. Holloyd v. Sheridan, 53 App. Div. (N. Y.) 14, 65 N. Y. Supp. 442.

upon the highway may be a nuisance.[116] But it has been decided that a bow window will not be enjoined as a nuisance merely because it projects over the building line where it is not a substantial or material impediment or obstruction to the passage of the public along the highway.[117] And it has also been held that a platform projecting over the sidewalk from the second story of a building and about eight feet above the walk, for the purpose of loading and unloading merchandise is not a nuisance *per se*.[118] Again, where the owner of land had marked off, on a map, space for a proposed street which, however, was never in actual use or accepted by the city council as a street, the court refused to grant an injunction restraining the erection of a building on such space, it being declared that the irreparable injury alleged consisted of the erection of a building on land which would be a street when actually laid out, and that no such injury would be sustained, because, if the right to the street should be thereafter established by a judgment of the court, the plaintiff would be entitled to an injunction requiring its removal.[119]

§ 234. Buildings encroaching on highway—Special injury to individual.—An individual who, by reason of a nuisance consisting of a building or structure encroaching on the highway, sustains a special injury differing in kind from that sustained by the public in general, may maintain an action to enjoin the continuance of the nuisance and may also be entitled to damages. So where an abutting owner was obstructed in his easement of light,

116. Commonwealth v. Blaisdell, 107 Mass. 234; Hyde v. County of Middlesex, 2 Gray (Mass.), 234. Compare McDonald v. English, 85 Ill. 232.

117. Gray v. Baynard, 5 Del. Ch. 499; Jenks v. Williams, 115 Mass. 217. But see Reimer's Appeal, 100 Pa. St. 182, 45 Am. Rep. 373, holding that a bow window, sixteen feet above the sidewalk which extends three feet and six inches over the building is a public nuisance which is not even justified by a municipal ordinance; Hess v. Lancaster, 4 Pa. Dist. R. 737, holding that an oriel window, fourteen feet above the sidewalk and extending over is a public nuisance which the city authorities may remove.

118. Parmenter v. City of Marion, 113 Iowa, 297, 85 N. W. 90.

119. Northrup v. Simpson, 69 S. C. 551, 48 S. E. 613. As to highways not completed or not lawfully established or differing from plans, see § 216, herein.

air and view by the erection of pillars of a building on the adjoining premises which encroached on the sidewalk, it was decided that he was entitled to an injunction against such nuisance even though the fee to the soil in the highway was in the defendant.[120] And in case of the unauthorized erection by a city of buildings in a street, an action may be maintained by an abutting owner, who is so injured, to abate the nuisance and to recover damages.[121] And where access of an abutting owner to the business section of the city was cut off by the erection of a building in the street he was held to sustain such a special injury as would entitle him to maintain an action for the damages sustained.[122] So where land long used as a street and which had not been legally discontinued as a highway was sold by the city which claimed the fee thereto, it was held that where an owner of a warehouse, which was rendered less desirable for business purposes on account of travel being diverted by such structure, was obliged to reduce the rent for his warehouse, sustained a special injury which entitled him to recover.[123] But an individual who sustains no special injury by the encroachment of steps upon the highway cannot maintain an action for damages.[124] And where the value of a boarding house was diminished by the erection of a freight depot across the street, which interfered with travel, it was determined that irreparable injury was not caused thereby, but that the injury being permanent and there being no question of the insolvency of the defendant, the abatement of the nuisance would not be ordered in an equitable proceeding, but that the plaintiff would be left to his remedy at law for damages which would afford him full remedy.[125]

120. First National Bank v. Tyson, 133 Ala. 459, 32 So. 144, 59 L. R. A. 399, 91 Am. St. R. 46. As to structures obstructing light or air, see § 236, herein.

121. Pettit v. Grand Junction, 119 Iowa, 352, 93 N. W. 381.

122. O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N. E. 302, 92 Am. St. R. 305. As to injury to access or egress, see § 222, herein.

123. Stetson v. Faxson, 19 Pick. (Mass.), 147, 31 Am. Dec. 123.

124. McDonald v. English, 85 Ill. 232. As to necessity of special injury in case of a nuisance affecting a highway, see §§ 218, 219, herein.

125. Dennis v. Mobile & Montgomery Ry. Co., 137 Ala. 649, 35 So. 30, 97 Am. St. R. 60.

§ 235. **Building encroaching on highway—Right to temporary and mandatory injunction**—In the application of the rules that a temporary injunction will not be granted unless the court cannot, without it, do justice between the parties by its final judgment and that where it works greater hardship to the defendant to grant it than it does to the plaintiff to refuse it, the court will refuse it, it has been decided that an injunction requiring the removal of steps, coping and an area forming part of a building in the course of construction, plans for which had been filed with and approved by the building department will be refused, where the alleged encroachments are practically completed.[126] The court said in this case: "I do not think that the neglect of the proper authorities of the municipal government, if such neglect there was, can deprive the public of their rights in a public thoroughfare, and the approval of the building department of the plans filed, if such plans were in violation of the law and tended to deprive the people of their rights in the street would not be sufficient to legalize the encroachments sought to be removed in this action. The encroachments complained of are practically completed at the present time, and the fact that they have been completed in full compliance with plans filed with the building department and approved by it, may properly be considered on this application as affecting the exercise of the discretion resting with the court. Furthermore, I do not consider that the fact that numerous other violations of a similar character exist, as urged by the defendant, affords any excuse for the present violation, if it be determined to be one; but conceding that the city is entitled to the relief sought in this action upon the trial thereof, it does not necessarily follow that it is entitled to a preliminary injunction. 'Such an injunction should not be granted . . . unless without it the court could not, by its final judgment, do justice between the parties.'[127] And in this action there is no reason why by final judgment justice cannot be done. If the encroachments complained of are in violation of law their removal can be decreed. The defendant will complete them at its peril. As they are substantially completed

126. New York v. Knickerbocker Trust Co., 41 Misc. R. (N. Y.) 17, 83 N. Y. Supp. 576.

127. Van Veghten v. Howland, 12 Abb. Pr. N. S. (N. Y.) 461.

at the present time and some measure of acquiescence has been given to the work now done by the city authorities, as I have indicated, I have determined not to require either their removal or to restrain their completion at the present time. When the granting of a temporary injunction would work a greater hardship to the defendant than its refusal would to the plaintiff, the injunction should be refused." [128]

§ 236. Structure obstructing light and air—Right of adjoining owner.—One owning property abutting on a street has, in addition to the right of travel or passage over the street, a right to the enjoyment of the light and air which the highway affords, and any unlawful obstruction upon or above the highway which materially interferes with or impairs this right constitutes a nuisance which may be enjoined. Thus it has been so held where a person commenced the erection of a structure seventeen feet above the ground and about three stories in height for the purpose of connecting buildings on the opposite sides of a street by which there was an obstruction of the light and air, which the highway afforded to plaintiff's premises.[129] The court said in this case: "The abutting lot holder has the right to the enjoyment of the light and air which the highway affords. To deprive him of this right would be to impair, or it might be, to destroy the comfort, enjoyment or use to be derived from the easement to which he is entitled, and we find this recognized by very high authority.[130] . . . The right of the abutting owner to light and air from a public highway as part and parcel of the easement is distinctly recognized in the authorities when such right has been drawn in question, and it rests upon sound and obvious reason. Recognition of this right is not all at variance with the decisions of this and other courts of this country in regard to the doctrine of ancient lights, which hold that such doctrine is unsuited to conditions here. . . . The doctrine of ancient lights that they repudiate involves an abridgement of the use which an owner can make of

128. Per Blanchard, J.

129. Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. R. 441.

130. 2 Dillon on Mun. Corp. (4th Ed.) § 712.

his own property. It puts upon the property of one a servitude in favor of another. This is not the nature of the right to light and air from a highway which belongs to an abutting owner as part of the easement. This right to light and air is the distinct right of every abutting owner. . . . If the public easement has been improperly and unlawfully obstructed by the appellee, then he has been guilty of creating a nuisance; and if the appellants have suffered therefrom an injury different in kind from any beyond that suffered by the community generally; or special and particular damage resulting to them by reason of the nuisance, then they have a right to their private remedy for such injury."[131] In a case in Massachusetts, however, where the plaintiffs did not allege that they had any easement or right of light and air across the front of the defendant's house, it was decided that they could not have any such easement or right, except by grant or agreement intended for their benefit, and that in the absence of any such grant or agreement, neither the interference with the plaintiff's prospect, nor the general diminution of the value of their estate, by the building of a bow window extending over the limits of the highway, afforded any ground for the interposition of a court of equity, unless it amounted to a nuisance, which could not be seriously predicated of the injury alleged in the bill.[132]

§ 237. **Overhanging eaves, pipe conductors, etc.**—Where it is provided by statute that any building upon or over any highway is a nuisance, a building which is so erected that its roof overhangs a street is a nuisance.[133] And in the absence of any statute or ordinance an eaves trough which projects over the sidewalk may be a nuisance. So it has been decided that the maintaining of a weak, warped and rotten eaves trough twenty feet above and projecting over the highway in a city is a menace to every person passing along and is a nuisance, and that whoever is injured as a result thereof has his remedy against the persons responsible for this condition of the premises.[134] And a pipe conductor of water

131. Per Jones, J.

132. Jenks v. Williams, 115 Mass. 217.

133. Garland v. Towns, 55 N. H. 55, 20 Am. Rep. 164.

134. Keeler v. Lederer Realty Co., 26 R. I. 524, 59 Atl. 855, holding, also, that where an eaves trough in such a condition gives way beneath the weight of ice and snow and falls,

from the roof to the sidewalk which interferes with the use of the highway will be regarded as a nuisance.[135] Thus it has been so held where a conductor by its natural operation causes the formation of ice upon the sidewalk.[136] In the case of a building so constructed that ice and snow from the roof will fall into the street the owner is held responsible where he has access to and control over the roof, though the building is occupied by tenants.[137] Where, however, the building and roof are in the absolute control of the tenant, it has been decided that the owner is not responsible for an injury resulting from such a cause.[138]

§ 238. **Building liable to fall into highway.**—A building which, by reason of inherent weakness or its dilapidated condition, as where it has been injured by fire, is liable to fall into the highway and injure passers-by or persons lawfully thereon, is a public nuisance and in case special damage is sustained by an individual as a result thereof, he may recover for such injury.[139] The owner of a building adjoining a street or highway is under a legal obligation to take reasonable care that it is kept in proper condition so that it will not fall into the street or highway and injure persons lawfully there, and it has been decided that where an injury is caused by the building falling the owner must show that he has exercised such care, and that a want of reasonable care will be presumed from the fact of the injury in the absence of explanatory circum-

injuring a person, the weak trough is the proximate cause of the injury, on the ground that where one of two causes combine to produce an injury, one being a natural cause for which neither party is liable and the other one for which the defendant is responsible, the latter will be regarded as the proximate cause.

135. Hyde v. County of Middlesex, 2 Gray. (Mass.), 267.

136. Leahan v. Cochran, 178 Mass. 566, 60 N. E. 382, 53 L. R. A. 891, 86 Am. St. R. 506. Compare Wenzlich v. McCotter, 87 N. Y. 122, 41 Am. Rep. 358.

137. Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318.

138. Leonard v. Storer, 115 Mass. 86, 15 Am. Rep. 76.

139. Morris v. Barrisford, 9 Misc. R. (N. Y.) 14, 29 N. Y. Suppl. 17, 59 N. Y. St. R. 698. See Nazworthy v. Sullivan, 55 Ill. App. 48, holding that a building on a city street which is unfit for human habitations or other lawful uses, devoted to no use or purpose, a resort for tramps or disorderly persons, and which is a source of serious discomfort and annoyance to the public, and of actual danger to useful and valuable prop-

stances.[140] So, in an action by one who had been injured while passing along the highway by a falling building, it was said by the court: "The law imposed upon the defendant, when it exercised its lawful right of constructing a rolling mill upon the premises adjoining a public highway, the duty towards the general public, having the right of passing along or lawfully being in that highway, to so erect it as to render it reasonably safe, and sufficiently strong, not only to resist the strain upon the supporting timbers of the roof, but strong enough to support the roof, in all ordinary weather; and also under such extraordinary occurrences as were likely to arise in that locality, based upon past experience."[141]

§ 239. **Fences encroaching on highway.**—A fence which obstructs a highway or encloses a part thereof is a public nuisance.[142]

erty of the community within the range of its influence is to be regarded as a public nuisance. Smith v. Sprague, 55 Me. 190.

Such a building is a private nuisance where it is liable to fall and injure adjoining property. Timlin v. Standard Oil Co., 54 Hun (N. Y.), 44, 7 N. Y. Suppl. 158, 26 N. Y. St. R. 42.

The board of health is held, in New York, to have power to remove a part of a building which has become a source of danger to people on the highway as a result of fire. Smith v. Irish, 37 App. Div. (N. Y.) 220, 55 N. Y. Suppl. 837.

140. Mullen v. St. John, 57 N. Y. 567, 15 Am. Rep. 530.

141. Wilkinson v. Detroit Spring & Steel Works, 73 Mich. 405, 417, 41 N. W. 490, per Champlin, J.

142. Demopolis v. Webb. 87 Ala. 659, 6 So. 408; Harniss v. Bulpitt (Cal., 1905), 81 Pac. 1022; Hubbard v. Deming, 21 Conn. 356; Savannah, Florida & W. R. Co. v. Gill, 118 Ga. 737, 45 S. E. 623; Mosher v. Vincent, 39 Iowa, 607; Houck v. Wachter, 34 Md. 265, 6 Am. Rep. 332; Commonwealth v. Tucker, 2 Pick. (Mass.) 44; Neal v. Gilmore (Mich., 1905), 104 N. W. 609; Wicks v. Thompson, 13 N. Y. Supp. 651, 38 N. Y. St. R. 340; Commonwealth v. McNaugher 131 Pa. St. 55, 18 Atl. 934; Vogt v. Bexar County, 16 Tex. Cix. App. 567, 42 S. W. 127; Chippewa Falls v. Hopkins, 109 Wis. 611, 85 N. W. 553. See Seidschlag v. Antioch, 207 Ill. 280, 69 N. E. 949.

A fence on a common landing place is a nuisance. Commonwealth v. Tucker, 2 Pick. (Mass.) 44.

A fence across a private way in which the public have a right of way is a public nuisance. Robinson v. Brown, 182 Mass. 266, 65 N. E. 377.

A judgment should be sufficiently definite, where it restrains a defendant from encroaching upon a highway by a fence, to inform him what lands he is forbidden to enclose. Petersen v. Beha, 161 Mo. 513, 62 S. W. 462.

And where a person has erected a fence enclosing a part of the highway a bill to restrain its continuance may be brought by the city, which is not confined to the remedy of ejectment merely because the premises are in the possession of the defendant.[143] A fence so erected may also in some cases be removed by the proper authorities, but they must not act in a reckless or wanton manner.[144] But it has been decided in Wisconsin that power given to a municipality "to abate nuisances," and "to prevent the obstruction of streets," confers no authority to summarily remove a fence which has encroached upon the highway for a period of about seventeen years, which was not placed there intentionally or maliciously, and which does not interfere with the public use of the street.[145] One who so maintains a fence will be liable to one who sustains a special injury in consequence thereof.[146] So, where a person's horse was injured by a barb-wire fence which encroached upon the highway, it was decided that the one maintaining it was liable for the injury.[147] A defendant, however, is not liable for such a nuisance, where he acts merely as agent of another, and he has no title or possession and makes no claim thereto.[148]

§ 240. **Fences encroaching on highway—Action by individual.** —In case a special injury has been sustained by an individual as

143. Mt. Clemens v. Mt. Clemens Sanitarium, 127 Mich. 115, 86 N. W. 537. See, also, as to this being proper remedy though defendant is in possession, Texas v. Goodnight, 70 Tex. 682, 11 S. W. 119; Eau Claire v. Matzke, 86 Wis. 291, 56 N. W. 874, 39 Am. St. R. 900.

144. Crouse v. Miller, 19 Pa. Super. Ct. 384. As to power of municipality to summarily abate or remove nuisances, see §§ 345-352, herein.

145. Pauer v. Albrecht, 72 Wis. 416, 39 N. W. 771.

146. Osborn v. Union Ferry Co., 53 Barb. (N. Y.) 629.

147. Anderson v. Young, 66 Hun (N. Y.), 240, 21 N. Y. Supp. 172, 49 N. Y. St. R. 480.

A barbed wire fence along a railroad track is not a nuisance *per se*, but may or may not be one, according to circumstances. Guilfoos v. New York C. & H. R. R. R. Co., 69 Hun (N. Y.), 593, 23 N. Y. Supp. 925, 53 N. Y. St. R. 538. See Rehler v. Western New York & Pa. R. R. Co., 28 N. Y. St. R. 311, 8 N. Y. Supp. 286.

148. Cook v. Bellack, 109 Wis. 321, 85 N. W. 325.

the result of a nuisance consisting of a fence which encroaches upon the highway, he may maintain an action therefor.[149] So, where one erected a fence in front of his property so that but eight feet were left for public travel, instead of nineteen, as the street was laid out to have, and an owner of a lot fronting on the same street was peculiarly affected in his right of access by this obstruction, it was decided that he sustained a special injury, the extent of which was immaterial, which would entitle him to maintain an action to abate the nuisance.[150] In another case it appeared that, at the time a fence had been erected by a railroad company across a highway, the plaintiff had a contract to haul five thousand loads of dirt at fifteen cents a load from one side of the railroad to the other and was actually engaged in hauling them, and that the natural and most convenient route for the contractor to take was over the obstructed road. Three loads could be delivered over this route in the same time that was required to deliver one over the route he was compelled to take after the fence was erected, and the expense of using the latter route was about three times as much or forty cents a load. The court held in this case that the plaintiff suffered a material and special loss or injury, which would entitle him to recover damages therefor.[151] Again, an exception as to the sustaining of a special injury being essential to the maintenance of a proceeding to abate is made in a case in the Federal courts where the defendant was a receiver for a railroad and had constructed a fence across a highway where the railroad crossed it. It was declared in this case that the principle relied on, that no such proceeding could be brought by an individual whose injury was one in common with the public, could not aid the appellant who was a receiver of the Federal courts and as such

149. Demopolis v. Webb, 87 Ala. 659, 6 So. 408; Savannah, Florida & W. R. Co. v. Gill, 118 Ga. 737, 45 S. E. 623; Shephard v. Barnett, 52 Tex. 638.

One maintaining a fence in a highway cannot bring a proceeding to enjoin the maintenance of such a fence by another, as he thus comes into court with unclean hands and is not entitled to invoke the jurisdiction of a court of equity. Brutsche v. Bowers, 122 Iowa, 226, 97 N. W. 1076.

150. Crooke v. Anderson, 23 Hun (N. Y.), 266.

151. Knowles v. Pennsylvania R. R. Co., 175 Pa. St. 623, 34 Atl. 974, 52 Am. St. R. 860.

was required by law to manage and operate the railroad property according to the requirements of the valid laws of the State in which such railroad was situated. The court said: "It is of the greatest importance that receivers of the Federal courts shall not be violators of the State laws; and whenever a court is made to know, in any proper way, that its receiver is violating the law of the State in which is the property of which he has charge, the court must *sua sponte* direct him to cease further violation. We cannot, therefore, on any technical rules of procedure, however well established as between private litigants, suspend this appeal and reverse the order below, if it appears that the receiver's act, enjoined by order of the court appealed from, was a violation of public right." [152]

§ 241. **Statutory penalty for encroachment or obstruction—Fences.**—Where the statute provides a penalty for an "obstruction" of a highway it has been decided that it is not recoverable in the case of a fence which is merely an encroachment upon the highway, but which does not hinder, impede, or render dangerous the travel thereon.[153] And where it is a prerequisite to any liability for the penalty provided by statute for neglect or refusal to remove an obstruction or encroachment upon a highway, that the highway commissioner shall give notice to the person responsible, specifying the "extent and location of such obstruction or encroachment," the notice must contain a precise and certain description of the particulars of the encroachment to such an extent at least as will enable the party upon whom it is served to go upon the ground and fix the place and extent of the encroachment with certainty.[154]

152. Felton v. Ackerman, 61 Fed. 225, 228, 9 C. C. A. 457, per Taft, C. J.

153. State v. Pomeroy 73 Wis. 664, 41 N. W. 726.

154. Sardinia v. Butler, 149 N. Y. 505, 44 N. E. 179, holding that a notice was insufficient which complained of a certain fence as encroaching on the highway and stated "That said fence or fences encroches upon said highway along the whole of your said land to the westerly line thereof at different distances, ranging from seven feet four inches to fifteen feet (as more particularly appears by reference to a map now in my possession and which you are at liberty to inspect at any time), and that all the narrow strip or piece of

§ 242. Use of highway by railroad—Where legalized.—A railroad which has been constructed and is operated along a highway under competent authority is not a nuisance where it is operated and maintained in a proper and careful manner.[155] One to whom such a right is granted must, however, comply with its charter and any ordinances and statutory provisions controlling in such cases, and can only act within the limits of the power conferred.[156] And if a street is used by a railroad company beyond

land which lies under said fence or fences, and between said fence or fences and the northerly line of said highway, is a part of the public highway aforesaid." See, also, as supporting text, Spicer v. Slade, 9 Johns. (N. Y.) 359; Mott v. Comm'rs of Highways of Rush 2 Hill (N. Y.), 472; Cook v. Covill, 18 Hun (N. Y.), 283.

155. Mobile v. Louisville & N. R. Co., 84 Ala. 119; Perry v. New Orleans & M. & C. R. Co., 55 Ala. 413, 28 Am. Rep. 640; Denver v. Denver & S. F. R. Co., 17 Colo. 583; Colorado Central R. Co. v. Mollaudin, 4 Colo. 154; Murphy v. Chicago, 29 Ill. 279, 81 Am. Dec. 307; Moses v. Pittsburgh, Ft. W. & C. R. Co., 21 Ill. 516; State v. Louisville, N. A. & C. R. Co., 86 Ind. 114; Milburn v. Cedar Rapids, 12 Iowa, 246; Louisville & N. R. Co. v. Orr, 12 Ky. Law Rep. 15 S. W. 8; Lexington & O. R. Co. v. Applegate, 8 Dana (Ky.), 298, 33 Am. Dec. 497; Poole v. Falls Road Elec. R. Co., 88 Md. 533, 41 Atl. 1069; Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62, 31 Am. Rep. 306; Randle v. Pacific R. Co., 65 Mo. 325; Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. 75, 86 Am. Dec. 252; Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186; Hodginson v. Long Island R. Co., 4 Edw. Ch. (N. Y.) 411; Brooklyn City R. Co. v. Furey, 4 Abb. Pr. N. S. (N. Y.) 364; Fletcher v. Auburn & S. R. Co., 25 Wend. (N. Y.) 463; Hentz v. Long Island R. Co., 13 Barb. (N. Y.) 646; Hamilton v. Hudson River & H. R. Co., 9 Paige (N. Y.), 171; Ridley v. Seaboard & R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708; Parrot v. Cincinnati, H. & D. R. Co., 10 Ohio St. 624; Northern C. R. Co. v. Commonwealth, 90 Pa. 300. See chap. 6, herein, as to legalized or statutory nuisances generally.

Evidence is admissible that a city ordinance authorized the construction and operation of the road complained of, and that the defendant has complied with such ordinance where the charter of the city gave it power to direct and control the location of railroad tracks thereon. Colorado Central R. Co. v. Mollaudin, 4 Colo. 154.

A defendant who claims the right under its charter to do the acts complained of as a nuisance must show such right by plea or otherwise. Parrot v. Cincinnati, 3 Ohio St. 330.

156. Metropolitan City R. Co. v. Chicago, 96 Ill. 620; Commonwealth v. Erie & N. E. R. Co., 27 Pa. 339, 67 Am. Dec. 471.

Operating a street car line by

what is necessary for the proper operation of its road, a public nuisance will be thereby created, for which the company will be liable to indictment,[157] or in case an individual sustains a special injury in consequence thereof it will be liable in damages to him for such injury.[158]

§ 243. **Same subject—Duty in construction of railroad.**—A railroad upon or across a highway, though legalized, must be so constructed as not to impair the usefulness of such highway when no necessity therefor exists. If an obstruction is unnecessarily created or the usefulness or safety of a street is unnecessarily impaired, a nuisance will be created.[159] So, though a railroad company may be authorized to straighten its road, change its grade, lay additional tracks and sidings, subject, however, to the limitation that it shall keep the highways which their tracks may cross fit for safe and convenient use by the public, it will not be permitted to so construct its tracks as to effectually destroy the use of a highway for its ordinary purposes, and such a construction and use will be enjoined.[160] And where a railroad is constructed

underground cable where the charter confers authority to operate by animal power has been held, however, not to constitute a nuisance and the company is held not liable to an individual for such an abuse of its corporate powers. Chicago General Elec. Ry. Co. v. Chicago City Ry. Co., 186 Ill. 219, 57 N. E. 822, affirming 87 Ill. App. 17.

Where authority to lay tracks in the middle of the street is conferred, a nuisance is not created by the fact that a track diverged slightly from the location prescribed for the purpose of entering private property where it does not appear that it interferes with public travel. Commonwealth v. Wilkes Barre & K. S. R. Co., 127 Pa. 278, 17 Atl. 996.

A departure in a mere detail of construction by a street railway company where the road has been built in substantial accord with plans approved by the proper authorities will not render the same a public nuisance. Thus it has been so declared where a cross over switch was not laid at the exact location designated. Howard v. Hartford Street Ry. Co., 76 Conn. 174, 56 Atl. 506.

157. Mason v. Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418. See State v. Louisville & N. R. Co., 91 Tenn. 445, 19 S. W. 229.

158. Harman v. Louisville, N. O. & T. R. Co., 87 Tenn. 614, 11 S. W. 703.

159. Windsor v. Delaware & H. Canal Co., 92 Hun (N. Y.), 127, 36 N. Y. Supp. 863. As to nuisance caused by railroad by manner of construction or use, see § 75, herein.

160. Newark & Delaware, Lack. & W. R. R. Co., 42 N. J. Eq. 196, 7 Atl. 123.

in a highway the obligation rests upon the one constructing it to restore the highway to its former state of usefulness and safety so far as is possible, having in view the necessities of the lawful operation of the road. This duty is frequently imposed by statute or by the terms of the grant to construct and maintain the road, but in the absence of such an express provision the one constructing the road is under the obligation to so restore it, and a failure to do so will create a nuisance.[161] So, where a railroad company was, by its license, to lay its tracks upon the highway, required to restore such highway to its former state of usefulness, or so near thereto that it should not unnecessarily impair such usefulness, it was held to be liable in damages for a nuisance maintained by it in the form of an embankment upon a street in front of abutting premises by which access thereto was materially impaired.[162] But it has been decided that the failure alone of a railroad company to properly ballast its roadbed, where sufficient space is left in the street for ordinary vehicles and teams to pass in front of abutting property, will not authorize a recovery by an abutting owner for damages alleged to have been sustained by the destruction of his right of ingress and egress, where there is no evidence to show the terms and conditions upon which the privilege to build such railroad was conferred by the city so as to enable the court to say there was a departure therefrom.[163]

§ 244. **Construction of New York city subway—Acts authorizing use of streets construed.**—In the construction of the New York city subway the rapid transit commissioners were authorized by the Legislature to acquire the use of streets, avenues, squares, or public parks to facilitate such construction.[164] They

161. Kyne v. Wilmington & W. R. Co., 8 Houst. (Del.) 185, 14 Atl. 922; Commonwealth v. Louisville & N. R. Co., 22 Ky. Law Rep. 572, 58 S. W. 478, 702; Delaware, L. & W. R. Co. v. Buffalo, 4 App. Div. (N. Y.) 562, 38 N. Y. Suppl. 510, 73 N. Y. St. R. 600; State v. Monongahela R. R. Co., 37 W. Va. 108, 16 S. E. 519; Oshkosh v. Milwaukee & L. W. R. Co., 74 Wis. 534, 43 N. W. 489.

162. Coats v. Atchison, T. & S. F. Ry. Co. (Cal., 1905), 82 Pac. 640.

163. Wichita & C. R. Co. v. Smith, 45 Kan. 264, 25 Pac. 623. As to injury to access or egress, see § 222, herein.

164. Rapid Transit Act, Laws 1892, c. 556, § 5.

were also authorized to acquire any interest in real estate and privileges thereof of abutting owners necessary for the purpose of constructing and operating such road.[165] Claiming to act under these provisions, about two-thirds of a paved thoroughfare in front of Union Square was enclosed and used for the storage of tools and machinery and for the purpose of generating compressed air power for use along the entire line of work. In consequence of such encroachment upon the street a serious loss was caused to certain hotel proprietors in the immediate neighborhood, by whom an action was brought to recover damages and to enjoin the continuance of such structures, on the ground that it constituted a nuisance. The court on appeal sustained the contention of the plaintiffs and held that they were entitled to compensation for the loss sustained, it being declared that the erection of such structure in that place was not authorized by the acts referred to, that it was neither necessary nor reasonable, and that it could be located elsewhere or subdivided into smaller plants.[166]

§ 245. **Railroads in parks.**—A railroad unlawfully constructed in a park, and which obstructs passage in and about such park, or interferes with its use in the ordinary manner, is a nuisance. But where a city which held the title to a park for the use and benefit of the public granted a right of way to a railroad for a track over a remote portion of the park it was decided that an action could not be maintained by an individual in behalf of the people to abate and enjoin the track as a nuisance, it appearing that passage over and the ordinary use of the park were in no way interfered with.[167]

§ 246. **Unauthorized construction of railroad in streets.**—Streets and highways cannot be obstructed or encroached upon by

165. N. Y. Laws 1896, c. 729, § 39.

166. Bates v. Holbrook, 171 N. Y. 460, 64 N. E. 181, affirming 67 App. Div. (N. Y.) 25, 73 N. Y. Suppl. 417. As to nuisance caused by structure authorized by statute where locality not designated, see § 76, herein.

167. People v. Park & O. R. Co., 76 Cal. 156, 18 Pac. 141. Compare Kings County Sup'rs v. Sea View Ry. Co., 23 Hun (N. Y.), 180. As to public property, squares and lands, see § 213, herein.

a railroad without lawful authorization for such act, and where a railroad is constructed upon a street without such authority it will constitute a public nuisance.[168] And in such a case one showing a special injury by reason thereof will be entitled to bring an action to enjoin the same.[169] But in the absence of such an injury an abutting owner cannot maintain such an action, the proper remedy then being by a suit in behalf of the public.[170]

168. Denver & S. Ry. Co. v. Denver City Ry. Co., 2 Colo. 673; Hamden v. New Haven & N. Co., 27 Conn. 158; Johnson v. Baltimore & Potomac R. R. Co., 4 App. D. C. 491, 22 Wash. L. R. 781; Metropolitan City Ry. Co. v. Chicago, 96 Ill. 620; Commonwealth v. Old Colony & F. R. R. Co., 14 Gray (Mass.), 93; Commonwealth v. Vermont & M. R. Co., 4 Gray (Mass.), 22; Burlington v. Pennsylvania R. Co., 56 N. J. Eq. 259, 38 Atl. 849; Philadelphia v. River Front R. Co., 173 Pa. St. 334, 34 Atl. 60; Larimer & L. Street R. Co. v. Larimer St. R. Co., 137 Pa. 533, 20 Atl. 507; Appeal of Stewart, 56 Pa. St. 413; Commonwealth v. Erie & M. E. R. Co., 27 Pa. 339, 67 Am. Dec. 471; Faust v. Passenger Ry. Co., 3 Phila. (Pa.) 164; Philadelphia v. Citizens' Passenger R. Co., 10 Pa. Co. Ct. 16.

The public authorities may abate such a nuisance. Johnson v. Baltimore & Potomac R. R. Co., 4 App. D. C. 491, 22 Wash. L. R. 781. Compare Spokane Street R. Co. v. Spokane Falls, 6 Wash. 521, 33 Pac. 1072.

Where by agreement with a turnpike company a horse railroad track was about to be constructed on the turnpike by a corporation whose charter provided that it was "void so far as relates to the right to construct the said road in any town, until the act has been accepted by the selectmen," it was decided that the court would not restrain, as a nuisance, the construction of such track in a town through which the turnpike road ran, as the consent of the selectmen was not necessary and there was nothing to show that travel would be obstructed. District Attorney v. Lynn & B. R. Co., 16 Gray (Mass.), 242.

169. Glaessner v. Anheuser-Busch Brew. Assoc., 100 Mo. 508, 13 S. W. 707.

170. Reynolds v. Presidio & F. R. Co. (Cal., 1905), 81 Pac. 1118; Garnett v. Jacksonville St. A. & H. R. Ry. Co., 20 Fla. 889; Anthony Shoe Co. v. West Jersey R. Co., 57 N. J. Eq. 607, 42 Atl. 279; Borden v. Atlantic Highlands R. B. & L. B. E. R. Co. (N. J. Ch.), 33 Atl. 276.

Where a hotel and wharf for a steamboat line were situated about six miles from where the occupation of a highway leading thereto commenced and the occupation was such as to practically destroy the highway for the purposes of travel and people were thereby prevented to a great extent from coming to the hotel and wharf it was, however, decided that the owner thereof did not sustain such a special injury as would entitle him to maintain an ac-

§ 247. **Side tracks and switches.**—The use of a street by a railroad company for the purpose of laying a side track or a switch will not be a nuisance where there has been the required lawful authorization for such construction.[171] So, where a railroad company was authorized by law to lay necessary switches and turn-outs, and evidence was introduced showing that a certain turn-out was necessary, it was decided that, in the absence of evidence to the contrary, the side track and turn-out complained of were not a private nuisance. In such cases the burden rests on a person claiming a nuisance to prove it.[172] And where a turn-out is lawfully constructed, a car standing thereon a reasonable time, waiting for another car to pass, is not such an obstruction to travel as will render it a nuisance.[173] And it has been decided that a nuisance is not created by the fact that more railroad tracks are added in a street or by an increased use of tracks beyond what may have been originally thought to be probable, as the natural development of the locality and the change in conditions may make such enlarged use necessary for the public good and such changed conditions are to be expected and should be taken into contemplation.[174] But where there is no lawful authority for the construction of a side track or switch upon a street, an abutting owner who sustains an injury to his right of access or egress, or some other special damages, may be entitled to an injunction restraining the nuisance.[175] And although the right to construct a side track may be granted by the proper authority, it must be exercised with proper

tion to abate the nuisance. Old Forge Co. v. Webb. 57 App. Div. (N. Y.) 636, 68 N. Y. Suppl. 1145, affirming 65 N. Y. Suppl. 503, 31 Misc. 316.

171. Burrus v. Columbus, 105 Ga. 42, 31 S. E. 124, holding, however, that authority to construct a side track confers no right to take or damage private property without compensation. See Stockdale v. Rio Grande Western R. Co. (Utah, 1904), 77 Pac. 849.

172. Carson v. Central R. Co., 35 Cal. 325.

173. Ford v. Charles Warner Co., 1 Marv. (Del.) 88, 37 Atl. 39.

174. Oklahoma City & T. R. Co. v. Dunham, (Tex. C. A., 1905), 88 S. W. 849.

175. Southern Cotton Oil Co. v. Bull, 116 Ga. 776, 43 S. E. 52; Gustafson v. Hamm, 56 Minn. 334, 57 N. W. 1054, 22 L. R. A. 565; Knapp & Co. v. St. Louis Transfer Co., 126 Mo. 26, 28 S. W. 627. As to injury to access or egress, see § 222, herein.

An elevated railroad switch over a street may be restrained at the suit of an abutting owner. Wald-

regard to the rights of the public of the adjacent property holders. So, it has been decided that though the laying of such a track has been authorized by a city ordinance, yet it may be enjoined as a private nuisance at the suit of an abutting owner, where it has been so constructed as to materially interfere with his right of access.[176]

§ 248. **Cars standing at crossings or on streets.**—While a railway car is not of itself such a thing that its presence in a city street is *per se* a nuisance,[177] yet it may become one. A railroad company cannot make an unreasonable use of the highway nor convert such a thoroughfare into a yard for the storing or deposit of cars, to the injury of adjoining owners,[178] nor permit them to stand for an unreasonable or unnecessary length of time in front of a person's premises.[179] And where a railroad intersects a street, if cars are allowed to remain standing upon the crossing for any unreasonable period, so as to be an obstruction to travel, a public nuisance will be thereby created.[180] As to the right of a railroad company to obstruct the highway at crossings by leaving cars standing, the following words of the court in a Kentucky case are pertinent: "To secure the reasonable and proper use and enjoyment of the public road by the public, and of the railroad by its owners, each must be required to observe the maxim of law that every person is restricted against using his property to the prejudice of others. And as it is plain that the railroad and the public road cannot at the crossing-place both be occupied and used at the

muller v. Seaside & Brooklyn Elev. R. Co., 40 App. Div. (N. Y.) 242, 58 N. Y. Supp. 7.

176. Knapp & Co. v. St. Louis Transfer Co., 126 Mo. 26, 28 S. W. 627. As to nuisance caused by railroads by manner of construction or use, see § 75, herein.

177. Atchison, T. & S. F. R. Co. v. Morris, 64 Kan. 411, 67 Pac. 837, 11 Am. Neg. Rep. 215.

178. Mahady v. Bushwick R. R. Co., 91 N. Y. 148.

179. Angel v. Pennsylvania R. Co., 38 N. J. Eq. 58.

180. Cincinnati R. R. Co. v. Commonwealth, 80 Ky. 137; Illinois C. R. Co. v. Commonwealth, 20 Ky. Law R. 115, 45 S. W. 367.

A liability for the penalty provided for by statute in case of such an obstruction is held not to be incurred where a car is so left as to slightly project over a crossing where the use of the highway by the public is not interfered with. Illinois C. R. Co. v. People, 59 Ill. App. 256.

same time, even partially, the law, for manifest reasons, makes it the duty of persons traveling upon the public road to stop until an approaching train or car passes that point. But the public, on the other hand, is entitled to the unobstructed use of the public road at the crossing-place when it is not actually occupied or about to be occupied by moving trains or cars. To concede to the owners of railways the right to stop their trains or cars at the place the public road crosses the railroad would not merely render the latter inconvenient and dangerous, but, in many cases, useless. Not even business necessities will authorize the owners of railroads to thus obstruct the public roads." [181] An obstruction, however, of a highway by cars standing therein will be relieved of its character as a nuisance where it appears that the obstruction was a necessary and exceptional one, caused by circumstances over which the company had no control. So, where, as a result of an unavoidable accident, a train was delayed and an excursion train was held at the station for thirty-five minutes, awaiting its arrival and it appeared that the excursion train could not have been safely uncoupled to prevent the obstruction complained of, it was decided that the company was not guilty of maintaning a public nuisance. And it was also decided in this case that the company was not liable for a nuisance in the obstruction of a highway resulting from the disorderly conduct of passengers who left the coaches and went upon the highway during such delay.[182]

§ 249. **Using street for terminal purposes of railroad switching cars, etc.**—The use of a street, over which a railroad has only a right of way, for the purposes of a terminal yard, will constitute a nuisance for which the company will be liable and which may be enjoined.[183] And a railroad company, whose right in a street is so restricted cannot make use of such street for the purpose of loading or unloading its cars, or for the shifting of its cars, or storing them, or for the making up of its trains.[184] So, where a

181. Cincinnati Railroad Co. v. Commonwealth, 8 Ky. 137, 139, per Chief Justice Lewis.

182. Louisville & N. R. Co. v. Commonwealth (Ky. Super. Ct.), 16 Ky. Law Rep. 347.

183. Pennsylvania R. R. Co. v. Angel, 41 N. J. Eq. 316, 7 Atl. 432, 56 Am. Rep. 1.

184. Glick v. Baltimore & O. R. Co., 19 D. C. 412, 19 Wash. L. R. 2; Kavanaugh v. Mobile & G. R. Co., 78

railroad company, without any right or authority, constructed a round-house and turn-table on public lands, such structures were held to be a nuisance.[185] In such cases one who sustains a special injury may maintain an action to abate the nuisance.[186] Where, however, it appears that the use complained of is not habitual, but only an occasional one, it has been decided that the existence of a nuisance is not sufficiently shown to warrant a court in enjoining the same.[187]

§ 250. **Railroad abutments and bridges.**—A railroad company has no right to construct any bridge over a highway or any abutments or embankments or approaches to bridges or structures, which encroach upon or obstruct the highway, except it acts under lawful authority in so doing. If the company cannot show a lawful authorization for its act, the encroachment will be regarded as a nuisance.[188] Such structure may, however, be relieved of its

Ga. 803, 4 S. E. 113; Black v. Brooklyn Heights R. R. Co., 32 App. Div. (N. Y.) 468, 53 N. Y. Suppl. 312. Compare Beideman v. Atlantic City R. Co. (N. J.), 19 Atl. 731.

185. Platt v. Chicago, B. & Q. R. Co., 74 Iowa, 127, 37 N. W. 107. As to public property, squares and lands, see § 213, herein.

186. Platt v. Chicago, B. & Q. R. Co., 74 Iowa, 127, 37 N. W. 107. Compare Johnson v. Baltimore & P. R. Co., 4 App. D. C. 491, 22 Wash. L. R. 781.

187. Ridge v. Pennsylvania R Co., 58 N. J. Eq. 172, 43 Atl. 275. See, also, preceding section as to occasional obstruction.

188. Advance Elevator & Warehouse Co. v. Eddy, 23 Ill. App. 352; Eldert v. Long Island Elec. R. Co., 165 N. Y. 651, 59 N. E. 1122, affirming 28 App. Div. 451, 51 N. Y. Suppl. 186; People v. Northern Central Ry. Co., 164 N. Y. 289, 58 N. E. 138; Delaware, L. & W. R. Co. v. Buffalo, 4 App. Div. (N. Y.) 562, 38 N. Y. Suppl. 510, 73 N. Y. St. R. 600; Elyria v. Lake Shore & M. S. Ry. Co., 23 Ohio Cir. Ct. R. 482. See Jeaume v. New York, L. & W. R. Co., 35 N. Y. St. R. 674, 13 N. Y. Suppl. 249.

Authority to highway commissioners to permit an extension of tracks of a surface railroad refers to an extension on the surface of the highway. They have no power to grant a right to connect a surface railroad with an elevated railroad by an incline plane constructed in the highway and such a structure will constitute a public nuisance. Eldert v. Long Island Elec. R. Co., 165 N. Y. 651, 59 N. E. 1122, affirming 28 App. Div. (N. Y.) 451, 51 N. Y. Suppl. 186.

Bridge abutments on a country highway which is but slightly used have been held not to inflict

character as a nuisance where it is erected under competent legal authority and the law has been complied with in the mode and manner of its construction.[189] Where, however, a railroad company relies upon a legislative act as justification for the occupation of a public highway, with its piers and abutments, it must show that the statute authorized either in express terms, or by clear and unquestionable implication, the doing of the very acts complained of, or that the statute was imperative and could not be executed without causing a nuisance.[190] In the case of railroad bridges, it has also been determined that they will not be regarded as nuisances where they are the necessary result of the lawful operation of the road and are constructed with due regard to the rights of the public in the highway.[191] And it has been declared that in determining whether such a bridge is a nuisance the question whether the erection worked injurious results to the people by being an unreasonable obstruction of the highway and an inconvenience to public travel, is to be considered.[192] So, an approach to a bridge over railroad tracks will not be regarded as a nuisance where it is a great convenience to the traveling public and avoids what would be a very dangerous crossing and consequent accidents if the tracks crossed the street at grade.[193] But where a highway bridge was so constructed over a railroad that brakemen on top of trains in the discharge of their duties could not avoid danger by

such a serious public injury as will induce a court to interfere by preliminary injunction, where such abutments were erected on the sides of the road which were overgrown with brush and weeds. Raritan Turp. v. Port Reading R. Co., 49 N. J. Eq. 11, 23 Atl. 127.

189. Garrett v. Lake Roland Elev. R. Co., 79 Md. 277, 29 Atl. 830, 24 L. R. A. 396, so holding as to the abutments and structure of an elevated railroad.

A railroad erected under lawful authority is not a nuisance. Ravenstein v. New York L. & W. R. Co., 136 N. Y. 528, 32 N. E. 1047, 18 L. R. A. 768. See §§ 67-84, herein, as to legalized nuisances generally.

190. People v. Northern Central Ry. Co., 164 N. Y. 289, 298, 58 N. E. 138, per Bartlett, J.; Delaware, Lackawanna & W. R. R. Co. v. Buffalo, 158 N. Y. 266, 273, 53 N. E. 44.

191. Jones v. Erie & W. V. R. Co., 151 Pa. St. 30, 25 Atl. 134, 31 Am. St. R. 722, 17 L. R. A. 758.

192. Commonwealth v. Northern C. R. Co., 7 Pa. Super. Ct. 234.

193. Commonwealth v. Pittston Ferry Bridge Co., 148 Pa. St. 621, 24 Atl. 87.

bending or stooping it was decided that the bridge was a nuisance *per se*.[194]

§ 251. **Accumulations of snow cleared from street railway tracks—Use of salt.**—If snow, removed by a street railway company from its tracks and deposited in heaps or banks upon the highway at the side of the tracks, is allowed by the company to remain there for an unreasonable length of time, a public nuisance will thereby be created,[195] and the company will be liable to one injured by such obstruction, though a duty may devolve upon others to remove the same.[196] As to the liability of a street railway company in this class of cases, it has been said: "There would seem to be no reasonable ground for claiming that where there was a large accumulation of snow alongside of the tracks, by reason of its removal from the same, which accumulation necessarily might be the cause of injury to persons who sought to enter the cars, and it was allowed to remain for a long period of time, to the inconvenience of passengers traveling in the cars, and causing loss of life or limb, the company would not be liable for the damages sustained by its neglect in not removing the snow. While the railroad company would have the right to remove the snow from its tracks, it could not lawfully cause an obstruction which would interfere with the safe passing and repassing of persons traveling upon the road. The duty imposed upon the railroad company is the same as that which is incurred by every owner of property adjoining a street in a populous city. Such owner is bound to remove the snow from the sidewalk to the street, but would not be justified in permitting its accumulation to so large an extent as to produce injury to those who might have occasion to use the street.

194. Louisville & N. R. Co. v. Hall, 87 Ala. 708, 6 So. 277, 4 L. R. A. 710. See Louisville, N. A. & C. R. Co. v. Wright, 115 Ind. 378, 17 N. E. 584, 7 Am. St. R. 446. Compare Neff v. N. Y. C. & H. R. R. Co., 80 Hun (N. Y.), 394, 30 N. Y. Suppl. 323, holding that a bridge without "tell-tales" maintained at such a height that a person standing on the top of a car can not pass under it, is not a nuisance *per se*.

195. Schrank v. Rochester R. Co., 83 Hun (N. Y.), 20, 31 N. Y. Suppl. 922, 64 N. Y. St. R. 754.

196. Markowitz v. Dry Dock, E. B. & B. R. Co., 12 Misc. R. (N. Y.) 412, 33 N. Y. Suppl. 702, 67 N. Y. St. R. 572.

He cannot negligently cause or maintain an obstruction or a nuisance upon or in front of his own premises which will occasion injury to passers-by, without being liable for the damage sustained thereby. The same rule would seem to be applicable to street railroads, and while they are permitted to enjoy the use of their tracks they must take care that they create no obstruction to persons passing to and from the same. They are bound to exercise reasonable care and diligence in the removal of snow and ice, preventing its accumulation during the winter season, and, if they are chargeable with negligence, are liable for the consequences arising from the same.[197] So, where a tramway company cleared their tracks by means of a snow plough and heaped up the snow on the sides of the street, and, for the purpose of facilitating its own traffic, the company scattered salt, which caused the snow in the grooves of its rails to melt and the mixture thus created flowed by gravitation into the heaps of snow already collected at the side, forming a freezing mixture, which caused injury to horses and inconvenience to traffic, which was compelled to force its way through the snow, it was declared that this constituted a nuisance to the highway.[198]

§ 252. **Trees in highway as a nuisance—Right of municipality to remove.**—Trees in a highway, which do not obstruct or impede travel, are not necessarily a nuisance,[199] and it has been declared in Iowa that it is in accordance with public policy to preserve them if practicable.[200] Trees may, however, become a nuisance by the development of the locality, and when such is the case the right of the municipality to remove them is said to be well

197. Dixon v. Brooklyn City & N. R. Co., 100 N. Y. 170, 3 N. E. 65, per Miller, J.

198. Ogston v. Aberdeen District Tramways Co. (1897), A. C. 111, 66 L. J. P. C. N. S. 1.

199. Board of Trade Teleg. Co. v. Blume, 176 Ill. 247, 52 N. E. 258; Everett v. City of Council Bluffs, 46 Iowa, 66; Patterson v. Vail, 43 Iowa, 412; Bills v. Belknap, 36 Iowa, 583; State v. Mayor of Vineland, 56 N. J. L. 474, 28 Atl. 1039, 23 L. R. A. 685.

200. Burgett v. Greenfield, 120 Iowa, 432, 94 N. W. 933, per McClain, J. See Quinton v. Burton, 61 Iowa, 471, 16 N. W. 569, holding that young trees and shrubs at the side of the road, off of the traveled track and which do not obstruct or interfere with the use of the highway by the public should be permitted to stand.

settled.[201] And in the absence of fraud or oppression, or of facts showing a clear abuse of discretion, the determination of the municipal authorities that trees within the limits of the highway are obstructions and nuisances will ordinarily be conclusive.[202]

§ 253. **Same subject continued.**—Where authority is conferred upon the common council of a municipality by its charter "to control and regulate the streets . . . and to remove and abate any obstructions and encroachments therein," and to "cause the removal of all obstructions in and upon all streets in said city," it has been decided that shade trees standing within the limits of the sidewalk and belonging to the abutting owner may be summarily cut down by the municipality, though it might not appear that such trees in fact constituted an obstruction. The court here said: "There can be no doubt but that the common council had the right to treat them as obstructions to the public travel, and a nuisance, and to abate the nuisance in the manner they did, to protect the public in the lawful use of the sidewalk and the city from liability for injuries which might be sustained by persons passing along and over it and who might be injured by such obstructions. Whether the trees were obstructions to travel and ought to be removed in order to make the sidewalk reasonably safe for travel, was, we think, a matter within the *quasi* legislative discretion conferred on the common council by the city charter. . . . The provisions in the city charter on the subject of encroachments and obstructions of streets and sidewalks give very extensive and

201. Stretch v. Cassopolis, 125 Mich. 167, 84 N. W. 51, 51 L. R. A. 345, 84 Am. St. R. 567; Miller v. Detroit, Ypsilanti & A. A. Ry. Co., 125 Mich. 171, 172, 84 N. W. 49, 84 Am. St. R. 569, 51 L. R. A. 955. See, also, Vanderhurst v. Tholcke, 113 Cal. 147, 45 Pac. 266, 35 L. R. A. 267; Hildrup v. Windfall City, 29 Ind. App. 592, 64 N. E. 942; Wilson v. Simmons, 89 Me. 242, 36 Atl. 380. As to power of municipality generally to remove or abate nuisances, see §§ 345-352, herein.

202. Vanderhurst v. Tholcke, 113 Cal. 147, 150, 45 Pac. 266, 35 L. R. A. 267, citing North Chicago City Ry. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788; Roanoke Gas Co. v. Roanoke, 88 Va. 810, 14 S. E. 665; High on Injunctions, vol. 3, § 593. See, also, Atlanta v. Holliday, 96 Ga. 546, 23 S. E. 509. As to power of municipality to declare things nuisances, see §§ 332-344, herein.

comprehensive powers to the common council, of a *quasi* legislative character, but without any particular directions as to the manner of their exercise; and these powers are peculiarly adapted to the needs of a growing and populous village or city. They are not only very comprehensive and far-reaching, but they clearly extend to the cutting down and removal of the trees in the manner adopted in the present instance, as they were manifestly obstructions to the sidewalk, although room was left on the walk for foot travel to pass. It was not necessary, in order that they should constitute an obstruction, so as to authorize their removal, that they should interrupt or stop travel. . . . A permanent obstruction, such as trees standing within a sidewalk or traveled street, or stone columns which may interfere with public travel, constitute *per se* a public nuisance, and may be summarily removed by direction of the common council." [203] In a case in New Jersey, however, it has been decided that power conferred upon a borough, "to declare what shall be considered nuisances in the street, roads, lots, and places in said borough, and to prevent and remove all obstructions, incumbrances and nuisances in and upon any street, road, lot, sidewalk, inclosure or other place in said borough," does not authorize the municipal authorities to declare anything to be a nuisance which cannot be detrimental to the health of the city, or dangerous to its citizens, or a public inconvenience. And the power to present and remove all encroachment was here held to be only a police power, which did not extend to cases of a doubtful or uncertain nature, and which are required to be first lawfully determined. In this case an ordinance declaring certain shade trees on one of the avenues obstructions and nuisances and directing that they be removed was held to be unauthorized under the power conferred upon the municipality, and therefore void.[204] But, while the power of a municipality to remove trees within the limits of the highway when they are an obstruction and a nuisance, is generally recognized, even though the fee to the soil in the highway belongs to the abutting owner, yet this power cannot be capriciously exercised so as to amount to a manifest abuse of dis-

203. Chase v. Oshkosh, 81 Wis. 313, 51 N. W. 560, 15 L. R. A. 553, 29 Am. St. R. 898, per Pinney, J.

204. State v. Mayor of Vineland, 56 N. J. L. 474, 28 Atl. 1039, 23 L. R. A. 685.

cretion. So, it has been decided in a case in Georgia, that where it palpably appears that no public necessity for the removal of shade trees standing on the edge of a sidewalk exists, and that no public convenience will be thereby subserved, the act of the municipal authorities in removing them will not be justified where poles for telegraph, telephone, and trolley wires are allowed to remain.[205] So, it has been said in this connection by the court, in a case in Iowa: "We do not say that if the public convenience demanded the removal of the trees that they should be or could be retained for plaintiff's comfort or to gratify his taste. But we do not find such a state of facts. Plaintiff surrendered the use of his land, which is occupied by the highway, for the public; but the public may not use it in a manner and to an extent not demanded by its convenience and wants, and to plaintiff's injury. The fee of the land is in plaintiff, and the trees are a part of the realty. If the removal of these trees is not required for the free and proper use of the highway, no principle of law will permit it to be done against the will and interest of the land owner. In our opinion the evidence clearly establishes that the public suffer no inconvenience from the trees, and that the wants of public travel do not demand their removal."[206] And it has also been decided that power so conferred on a municipality must be exercised by virtue of an ordinance of general application and not by an ordinance applicable to a particular person, thus permitting to one what is denied to another.[207]

§ 254. **Flag poles.**—Having in view the fact that streets and highways are primarily for the purpose of travel and that the public is entitled to an unobstructed passage except so far as it may be occupied for some lawful temporary purpose or by some legalized obstruction or encroachment, it would seem that a flag pole erected by an individual in a street would be regarded as a nuisance. And it has been so decided in a case in New Jersey.[208]

205. Atlanta v. Holliday, 96 Ga. 546, 23 S. E. 509.

206. Bills v. Belknap, 36 Iowa, 584, 585, per Beck, Ch. J.

207. Gitt v. Hanover, 4 Pa. Dist. R. 606. That a municipal ordinance must not discriminate but must be uniform in operation, see §§ 335-337, herein.

208. Dreher v. Yates, 43 N. J. L. 473, wherein it was said by the court "A flag-staff in a public street

In a case in Pennsylvania, however, it has been determined that a liberty pole so erected is not necessarily a nuisance and that if it is sound and is properly secured and protected there can be no recovery by one for an injury caused by its being broken by an extraordinary wind.[209]

is *per se* a nuisance and the reason of this is that, in the nature of things, it is an obstruction to those who have the right to the use of the street over the entire area. The fact of the existence of such a structure so located, justifies the allegation that it was an unlawful obstruction." Per Beasley, C. J.

209. Allegheny v. Zimmerman, 95 Pa. St. 287, 40 Am. Rep. 649. The court declared in this case that the right to partially obstruct the street was not limited to cases of strict necessity, but extended to purposes of convenience and ornament where it does not unreasonably interfere with public travel. It was also said by the court: "The erection of liberty poles appears to have been almost coeval with the birth of our nation. As the name imports, they were erected to symbolize our liberties and as a mode of proclaiming that we had thrown off all allegiance to the government of Great Britain. At first they appear to have been used as expressive of concurrence in the principles embodied in the Declaration of Independence. As time passed on they began to be erected by each political party of the country to express its greater devotion to the rights of the people. As the object of their erection was patriotic and with a view of inciting a spirit calculated to advance the public welfare, they were placed on highways and public squares. The people so desired it. The municipal authorities assented to it. It is a custom sanctioned by a hundred years and interwoven with the traditions, memories and conceded rights of free people. Unless forbidden by the authorities, it has been considered the exercise of a lawful license incident to citizenship. Hence in this case no leave was asked of the authorities to erect the pole, and no objection was made by them. The travel on the street where it stood was merely local. It did not occupy the street to such an extent or in such a manner that any person complained of its interfering with the public travel. To all appearance the pole was strong and sound. No doubt existed as to its strength. . . . If it has been a uniform custom for the people to erect such poles in the streets of the city from its earliest history under the implied assent of the municipal authorities, and if this one was carefully erected, having due regard to the material of which it was formed and the manner in which it was secured so that a careful and prudent person would have apprehended no danger therefrom, we think it was not a nuisance *per se*. It is therefore a question for the jury whether it was erected in such a place and manner and maintained for so long a time under all the circumstances as to create reasonable apprehension of danger." Per Mercur, J.

§ 255. **Objects frightening horses.**—Objects within the limits of the highway which are of such a character as to frighten horses of ordinary gentleness may be regarded as nuisances,[210] which will render a municipality liable for an injury caused thereby.[211] And such an object may, nevertheless, be a nuisance even though it does not encroach upon the traveled path and there is no danger of collision.[212] So it has been declared that while it is true that the owner of land adjacent to a highway and owning presumptively to the centre thereof may, subject to the public easement, make a reasonable use of the land even within the location, yet a use which involves the placing of objects of such a character as will naturally frighten horses ordinarily gentle and well broken, is not reasonable, but is unlawful and constitutes a nuisance.[213] So a railroad company which, for the purpose of loading and unloading freight, uses machinery and implements within the limits of the highway which will naturally frighten horses and in that way endanger travelers who are in the exercise of due care will be liable for an injury caused by such unauthorized use.[214] And sliding in a public street accompanied with boisterous conduct may likewise, under such circumstances, be a public nuisance,[215] as may also the obstruction of a street by an exhibition of wild animals.[216]

210. Clinton v. Howard, 42 Conn. 294; Ayer v. Norwich, 39 Conn. 376, 12 Am. Rep. 396; Young v. New Haven, 39 Conn. 435; Card v. Ellsworth, 65 Me. 547, 20 Am. Rep. 722; Lake v. Milliken, 62 Me. 240, 16 Am. Rep. 456; Bennett v. Fifield, 13 R. I. 139, 43 Am. Rep. 17; Little v. Madison, 42 Wis. 643, 24 Am. Rep. 435; Foshay v. Glen Haven, 25 Wis. 288, 3 Am. Rep. 73.

211. Ayer v. Norwich, 39 Conn. 376, 12 Am. Rep. 396; Stone v. Langworthy, 20 R. I. 602, 40 Atl. 832; Bennett v. Fifield, 13 R. I. 139, 43 Am. Rep. 17; Morse v. Richmond, 41 Vt. 435, 98 Am. Dec. 600; Foshay v. Glen Haven, 25 Wis. 288, 3 Am. Rep. 73. But see Bemis v. Arlington, 114 Mass. 507; Cook v. Charlestown, 98 Mass. 80; Titus v. Northbridge, 97 Mass. 258, 93 Am. Dec. 91; Keith v. Easton, 2 Allen (Mass.) 552. As to municipal liability generally, see §§ 353-358, herein.

212. Card v. Ellsworth, 65 Me. 547, 20 Am. Rep. 722; Foshay v. Glen Haven, 25 Wis. 288, 3 Am. Rep. 73. That public travel need not be obstructed, see, also, § 214, herein.

213. Lynn v. Hooper, 93 Me. 46, 44 Atl. 127, so holding in the case of a hay cap at the side of the highway.

214. Mudd v. Fargo, 107 Mass. 261, 264.

215. Jackson v. Castle, 80 Me. 119, 13 Atl. 49.

216. Little v. Madison, 42 Wis. 643, 24 Am. Rep. 435, holding that in

§ 256. **Same subject—Qualifications of rule.**—This rule, however, only applies in the case of a horse of ordinary gentleness and does not include every case in which a horse may be frightened irrespective of his disposition or of the object causing the fright.[217] And it is also limited in its application to this extent that persons using the highway with horses do not possess rights superior to those traveling by other means and that a new means of locomotion may be adopted and not be a nuisance, the question of liability then being dependent upon where there has been any negligence in such use.[218] So it has been declared that a street car, steam threshing machine or a fire engine, even though they might frighten horses when standing still, are not regarded as nuisance *per se*, nor dangerous to have in common use, if handled with due care.[219] So the operation of a portable engine near a public highway is not necessarily a nuisance.[220] As was said by the court in this case: "It would not do to say that the operation of a portable engine, near a public highway, necessarily resulted in creating a nuisance, when it is according to daily experience, during certain seasons of the year, customary to see steam threshing machines in op-

an action against a city a complaint was good on demurrer which alleged that the defendant knowingly and carelessly permitted the obstruction of its streets by an exhibition of wild animals, to wit, two bears, and that such exhibition was sanctioned and authorized by the city, was calculated to produce injury to persons lawfully upon the street, and that plaintiff's horse was thereby frightened and the plaintiff injured. As to animals generally, see chap. 11, herein.

217. Stone v. Langworthy, 20 R. I. 602, 40 Atl. 832, wherein it is said: "It is clear that the rule cannot apply to all horses irrespective of disposition, for a horse might take fright at a discoloration in the road, a stone, bush, post, leaves, or other objects for which it would be unreasonable to charge a town with liability." Per Stiness, J.

218. Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522, holding that it was error to instruct the jury, in an action for an injury caused by a horse taking fright at an engine mounted on wheels, that "a party placing upon the highway any vehicle unusual, and calculated from its appearance and mode of locomotion to frighten horses of ordinary gentleness, is liable for all damages resulting therefrom." See, also, in this connection § 212, herein.

219. Chicago Great Western Ry. Co. v. Kenyon, 70 Ill. App. 567, 569, 570.

220. Wabash, St. Louis & Pac. Ry. Co. v. Farrer, 111 Ind. 195, 199, 12 N. E. 296, 60 Am. Rep. 696.

eration on every hand, and often necessarily close to public highways. Road engines propelled by steam, and portable engines operated by steam, have become familiar in every agricultural community. To declare that their use near or their passage over, a public highway constituted a nuisance, would be practically to prohibit their use in the manner in which they are customarily employed and moved from place to place. It must be supposed that horses of ordinary gentleness have become so familiar with these objects as to be safe when under careful guidance." [221]

§ 257. **Toll-gates.**—The maintenance of a toll-gate and the collection of tolls without any lawful authority therefor, will constitute a public nuisance.[222] So it has been decided that such a nuisance is created where a turnpike company continues to exact tolls after its franchise has expired.[223] On the other hand, where a turnpike company constructed and maintained its road and established a toll-gate in accordance with a franchise granted to it by the State, it was decided that it was entitled to an injunction restraining the use of a private road and bridge which seriously injured the plaintiffs in the enjoyment of their franchise. The court said in this case: "The new road by its termini, and its vicinity, creates a competition most injurious to the statute franchise, and becomes what is deemed in law, in respect to such a franchise, a nuisance. It was observed in the case of Ogden v. Gibbons,[224] and shown to be a principle of the common law, that if one had a ferry by prescription, and another erected a ferry so near it, as to draw away its custom, it was a nuisance, for which the injured party had his remedy by action. . . . The same doctrine applies to any exclusive privilege created by statute; all such privileges come within the equity and reason of the principle; no rival road, bridge, ferry or other establishment of a similar kind and for like purposes, can be tolerated so near to the other as materially to affect or take away its custom. It operates as a fraud

221. Per Mitchell, J.

222. Columbus v. Rodgers, 10 Ala. 37; Lancaster Turnpike Co. v. Rogers, 2 Pa. 114, 49 Am. Dec. 179.

223. State, Allison v. Hannibal & R. C. G. R. Co., 138 Mo. 332, 39 S. W. 910, 36 L. R. A. 457.

224. 4 Johns. Ch. (N. Y.) 150, 160.

upon the grant and goes to defeat it. The consideration by which individuals are invited to expend money upon great, and expensive, and hazardous public works, as roads and bridges, and to become bound to keep them in constant and good repair, is the grant of a right to an exclusive toll. This right thus purchased for a valuable consideration, cannot be taken away by direct or indirect means, devised for the purpose, both of which are equally unlawful." [225]

§ 258. **Other particular obstructions, acts, or things as nuisances.**—In the application of the general rules as to the use of highways and nuisances therein, it has been decided that a nuisance exists in the case of logs piled in the highway but a few feet from the traveled track and allowed to remain for an unreasonable length of time;[226] a bill board standing upon the sidewalk;[227] an awning in front of abutting property in violation of an ordinance;[228] electric light wires not properly insulated;[229] the discharge of fire rockets on a city street;[230] coasting so as to endanger the safety of travelers;[231] use of abusive language on a highway;[232]

225. Newburgh & Cochecton Turnpike Co. v. Miller, 5 Johns. Ch. (N. Y.) 101, 110, 9 Am. Dec. 274, per The Chancellor.

226. Lawton v. Olmstead, 40 App. Div. (N. Y.) 544, 58 N. Y. Suppl. 36.

227. Wilkes-Barre v. Burgunder, 7 Kulp. (Pa.) 63.

228. Brinkman v. Eisler, 16 N. Y. Suppl. 154, 40 N. Y. St. R. 865.

A license to erect an awning where they are prohibited by a general ordinance is revocable at any time. Hibbard v. Chicago, 173 Ill. 91, 50 N. E. 256, 40 L. R. A. 621, affirming 59 Ill. App. 470.

229. United States Illuminating Co. v. Grant, 55 Hun (N. Y.), 222, 7 N. Y. Suppl. 788, 27 N. Y. St. R. 767. See Consolidated Elec. L. & P. Co. v. Healy, 65 Kan. 798, 70 Pac. 884, 13 Am. Neg. R. 71.

230. Cameron v. Heister (Ohio), 22 Wkly. Law Bul. 384.

Discharge of fireworks authorized by a municipality is not a nuisance *per se* so as to render the one discharging them liable for an injury caused thereby irrespective of the question of negligence. Crowley v. Rochester Fireworks Co., 95 App. Div. (N. Y.) 13, 88 N. Y. Suppl. 483.

As to liability of city to person injured by fireworks discharged in a public place under municipal license see Landau v. City of New York, 90 App. Div. (N. Y.) 50, 85 N. Y. Suppl. 816.

231. Wilmington v. Vandegrift, 1 Marv. (Del.) 5, 29 Atl. 1047, 65 Am. St. R. 256, 25 L. R. A. 538.

232. State v. Davis, 80 N. C. 351, 30 Am. Rep. 86, holding that an abutting owner who owns the fee to the soil of the highway may abate.

use of highway for purposes of a fair;[233] the grading of a street by an abutting owner in front of his premises in such a way as to obstruct passage and use in the ordinary manner;[234] permitting a railroad car containing explosives to stand for an unnecessary length of time at a station or failing to exercise reasonable care as to such a car;[235] and the maintenance of a fruit stand upon a sidewalk.[236] But where it did not appear that a water box constructed by the owner of a fee, adjoining a street, within the limits of the street opposite his land for the purpose of controlling the water from the main in the street, was illegally there, it was held that it might be presumed to be lawfully there and that if rightfully there, it only became a nuisance from faulty construction or condition so as to obstruct, endanger or interfere with the public use of the street.[237] And it has been decided that a hitching rack is not a nuisance *per se*.[238] And a use of streets by a duly incorporated company to lay pipes and apparatus for the purpose of conveying natural gas has been declared not to be a public nuisance.[239] Nor are telephone, telegraph or electric light poles when erected in a street under lawful authority.[240] Nor

233. Augusta v. Reynolds (Ga., 1905), 50 S. E. 998, so holding in the case of a street one hundred and eighty feet wide where it was proposed to occupy a space therein seventy-five or eighty feet in width and about four blocks in length with tents, buildings and structures, and it appeared that the fair would consist of tents inclosing shows and exhibitions, structures, stands, Ferris wheels, merry-go-rounds, "shoot the chutes," the "loops" and various other devices and obstructions for the amusement of the public. It was declared by the court that the proposed use of the street either in whole or in part did not have as a basis "any purpose which the law would recognize as lawful, in the absence of express legislative authority permitting it;" that the municipality had no power to authorize it and that it was a public nuisance. Per Cobb, J.

234. San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396.

235. Ft. Worth & D. C. Ry. Co. v. Beauchamp, 95 Tex. 496, 68 S. W. 502, holding that where adjacent property is injured by an explosion in such a case the company will be liable. See Marine Ins. Co. v. St. Louis, I. M. & S. R. Co., 41 Fed. 643.

236. Costello v. State, 108 Ala. 45, 18 So. 820, 35 L. R. A. 803.

237. Staples v. Dickson, 88 Me. 362, 34 Atl. 168.

238. Harrison County Ct. v. Wall, 11 Ky. Law R. 223, 12 S. W. 130.

239. Appeal of Borough of Butler (Pa.), 6 Atl. 708.

240. Irwin v. Great Southern Teleph. Co., 37 La. Ann. 63, 1 Am.

is a mere temporary structure for repairing a building such as a scaffolding which overhangs the sidewalks necessarily a nuisance.[241] Nor will a court enjoin as a nuisance gates constructed at a railroad crossing, they being regarded as a proper and necessary regulation for public safety.[242] Again, though the making of a speech in a street may, by reason of the street being obstructed, be a public nuisance, yet it is not one *per se*. As has been said: "A street may not be used, in strictness of law, for public speaking; even preaching or public worship, or a pavement before another's house may not be occupied to annoy him; but it does not follow that everyone who speaks or preaches in the street, or who happens to collect a crowd therein by other means, is therefore guilty of the indictable offense of nuisance. His act may become a nuisance by his obstruction of the public highway, but it will not do to say it is a nuisance *per se*." [243]

§ 259. **Damages recoverable.**—In an action to recover damages for an injury caused to abutting property by a nuisance upon the highway which is not permanent in its nature, the damages should be limited to those sustained up to the time of the commencement of the suit and should not be estimated on the basis of the diminu-

Elec. Cas. 709; Gay v. Mutual Union Tel. Co., 12 Mo. App. 485, 1 Am. Elec. Cas. 427.

Telephone poles are a public nuisance at common law where they are of such sizes, dimensions and solidity as to obstruct and prevent passage of carriages and horses or foot passengers. Reg v. United Kingdom Elec. Teleg. Co., 31 L. J. M. C. N. 167. Compare People v. Metropolitan Teleph. & Teleg. Co., 31 Hun (N. Y.), 596, 1 Am. Elec. Cas. 604, holding that such poles cannot be adjudged a public nuisance but may constitute a purpresture.

241. Hexamer v. Webb, 101 N. Y. 377, 4 N. E. 755, 54 Am. Rep. 703.

242. Miller v. Long Island R. Co., Fed. Cas. No. 9580 a. See Friedlander v. Delaware & H. Canal Co., 13 N. Y. Suppl. 323, 34 N. Y. St. R. 650, 58 Hun (N. Y.), 605, mem., holding that where the municipal authorities permit the construction at a crossing of gates of the most approved and effective kind, which are reasonably and skillfully adapted to their purpose and are opened, closed and used in a proper manner there can be no recovery by an adjoining landowner because of their maintenance, though he sustains more injury than others by reason of their location.

243. Fairbanks v. Kerr, 70 Pa. St. 86, 10 Am. Rep. 664, per Agnew, J.

tion of value of such property,[244] the depreciation in the value of the use or rental value being declared to be the proper measure of damages ordinarily.[245] Where, however, the nuisance is a permanent one, there may be a recovery of permanent damages, based generally on the depreciation in the value of the property injured,[246] to show which, evidence is admissible as to the value of the property before and after the erection of the nuisance complained of.[247] In case of a nuisance caused by the operation of a railroad in an unlawful manner, the damages should only be for the injury caused by such unlawful operation and should not include an allowance for any injury caused by the lawful operation of the road, the latter injury being declared to be *damnum absque injuria*.[248] Where an obstruction of a highway is a wilful and unnecessary one and of such a character as to show a culpable indifference to the rights of the public and a willingness to subject travelers to vexatious delay or injury, punitive damages may be awarded.[249]

§ 260. **Power of municipality to authorize obstructions or nuisances.**—As has already been stated, a municipality may, in many cases, where the necessary and sufficient power has been delegated to it by the legislature, authorize and legalize that within

244. Hopkins v. Western Pac. R. Co., 50 Cal. 190; Brakken v. Minneapolis & St. L. R. Co., 29 Minn. 41, 11 N. W. 124.

245. Pettit v. Grand Junction, 119 Iowa, 352, 93 N. W. 381; Van Siclen v. New York, 32 Misc. R. (N. Y.) 403, 66 N. Y. Suppl. 555.

246. Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 23 N. E. 621, affirming 30 Ill. App. 552.

247. Wallace v. Kansas City & Southern Ry. Co., 47 Mo. App. 491.

248. Thompson v. Pennsylvania R. Co., 51 N. J. L. 42, 15 Atl. 833.

Recovery should not be limited to nominal damages in such a case because of the inherent difficulty in distinguishing the damages due to the negligent operation from those caused in the careful operation of the road. A substantial part of the loss being occasioned by defendant's tortious acts and the residue being attributable to some lawful act of defendant, inseparable in its consequences from the tortious act, it has been declared that the jury should make from the evidence the best estimate under the circumstances as a basis of compensatory damages for the actionable injury. Jenkins v. Pennsylvania R. Co., 67 N. J. L. 331, 51 Atl. 704, 11 Am. Neg. Rep. 464.

249. Tutwiler Coal, Coke & Iron Co. v. Nail (Ala., 1904), 37 So. 634.

its limits which in the absence of such authorization would be regarded as a nuisance.[250] It has, however, no power to license the erection or commission of a nuisance in or upon a public street unless the power to so act is either expressly or by necessary implication conferred upon it either by the charter or by statute.[251] It does not exist by virtue of a general provision giving the city power to control and regulate its highways.[252] The fact that a municipality is invested with title to and control over the public streets, gives it no authority to exercise an arbitrary control without regard to the rights of the public. The streets and highways are held in trust for the benefit, use and convenience of the public generally and the power to control and regulate is to be exercised with reference to a public use as its object and not to promote the private interest of some individual in subordination to the rights of other citizens.[253]

§ 261. Same subject—Application of rules.—A municipality vested with such power cannot by ordinance authorize an individual to erect a structure over a street about seventeen feet above it and three stories in height, for the purpose of connecting buildings on opposite sides of the street where the supply of light and air from the highway to which an adjoining owner is entitled is there-

250. See §§ 78-80. herein.

New York City was authorized by the consolidation act as amended by Laws 1896, c. 718, to permit by ordinance the erection of booths under the elevated stairs and such authority was not taken away by the Greater New York charter, § 49, subd. 3. People v. Keating, 168 N. Y. 390, 61 N. E. 637, rev'g 62 App. Div. 348, 71 N. Y. Suppl. 97.

251. First National Bank v. Tyson, 133 Ala. 459, 32 So. 144, 91 Am. St. R. 46, 59 L. R. A. 399, citing 2 Dillon's Mun. Corp. § 660.

252. Gray v. Baynard, 5 Del. Ch. 499; Smith v. McDowell, 148 Ill. 51, 35 N. E. 141, 22 L. R. A. 393; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. R. 441; Berry Horn Coal Co. v. Scruggs-McClure Coal Co., 62 Mo. App. 93; Kalteyer v. Sullivan, 18 Tex. Civ. App. 488, 46 S. W. 283; Richmond v. Smith, 101 Va. 161, 43 S. E. 345, 13 Am. Neg. R. 465.

253. "The power over streets given to municipal corporations under the ordinary grants in municipal charters does not authorize the municipal authorities, even by express ordinance, to permit the erection in streets of temporary obstructions for purely private gain." Augusta v. Reynolds (Ga., 1905), 50 S. E. 998, 999, per Cobb, J.

by materially diminished.[254] Nor can a municipality unless authorized by the legislature legalize the construction of a railroad in a city street.[255] The municipal grant in such a case being without authority the railroad constructed in pursuance thereof is unlawfully upon the highway and a public nuisance which may be enjoined by one showing a special injury by reason thereof.[256] Nor under its general power to control and regulate streets can a municipality authorize an obstruction in an alley for private use so as to destroy the right of passage out and over said alley to the street and deprive a person of his right of ingress to and egress from such street.[257] And power given to the common council of a city to regulate matters connected with, and business conducted upon, the streets is construed as giving authority merely to regulate lawful uses and not to authorize an ordinance permitting the obstruction of a sidewalk by a booth or stand for the purpose of displaying goods or merchandise.[258] It has, however, been determined that where a municipality owns the fee of the streets it may authorize the erection and maintenance of poles and wires in the street for the purpose of furnishing light for the municipality and its inhabitants provided the ordinary use of the street for the purposes of travel is not thereby materially obstructed, and that an abutting owner is not entitled to an injunction in such a case except it is shown that he has sustained special and irreparable damages different in kind and character from those sustained by other property owners or the public generally.[259]

254. Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 52 L. R. A. 409, 86 Am. St. R. 441. See, also, Tilly v. Mitchell & Lewis Co., 121 Wis. 1, 98 N. W. 969. As to power of municipality as to erection of structures generally, see §§ 341-344, herein.

255. New Orleans City & L. R. Co. v. New Orleans, 44 La. Ann. 728, 748, 11 So. 77, 78; Philadelphia v. River Front R. Co., 173 Pa. St. 334, 34 Atl. 60. As to construction of railroads in streets and parks, see §§ 242-250, herein.

256. Glaessner v. Anheuser-Busch Brew. Assoc., 100 Mo. 508, 13 S. W. 707.

257. Van Mitzen v. Gotman, 79 Md. 405, 29 Atl. 608. As to injury to access or egress, see § 222, herein.

258. People v. Willis, 9 App. Div. (N. Y.) 214, 41 N. Y. Suppl. 168. As to exposure of wares for sale on sidewalk, see § 227, herein.

259. McWethy v. Aurora Elec. L. & P. Co., 202 Ill. 218, 67 N. E. 9. As to necessity of special injury generally, see §§ 218, 219, herein.

§ 262. **Municipal authority to declare things in highway nuisances.**—The authority of a town over its highways is to be determined by reference to the legislative power conferred,[260] which can only be exercised in the mode and manner prescribed,[261] and within the limits of the powers given. And authority given to a municipality to control and regulate its highways and to declare, prevent and remove nuisance, will not authorize it to declare that a nuisance which is not a nuisance either at common law or by statute, or is not in fact one.[262] So it has been decided that power conferred upon a city by its charter "to declare what shall constitute a nuisance," will not authorize it to declare an enclosure of a railroad track within the plotted portions of a city to be a nuisance.[263] And under a power to prevent injury and annoyances and to abate nuisances, the working of convicts on the streets of a city cannot be prevented by the municipality on the ground that it is a nuisance, it being declared that a grant of such power to a municipality does not give it power to condemn anything as a nuisance which in its situation, nature or use does not come within the legal notion of a nuisance.[264] And the act of one person halting on the streets for a reasonable time without misbehaving himself in any way, is not such a nuisance as the city has the right to forbid by its laws under the general power delegated to it.[265]

§ 263. **Same subject—Continued.**—Though a city may not have the power to declare that a nuisance which is not one *per se*, yet where an obstruction of a highway is a nuisance irrespective

260. State v. Mobile, 5 Port. (Ala.) 279, 30 Am. Dec. 564. See §§ 78-80, 330-352, herein, as to municipal powers generally.

261. Brigantine v. Holland Trust Co. (N. J. Ch.), 35 Atl. 344.

262. Ex parte Taylor, 87 Cal. 91, 25 Pac. 258; Laviosa v. Chicago, St. L. & N. O. R. Co., 1 McGloin (La.), 299, 303; Commonwealth v. Kinports, 12 Pa. Co. Ct. R. 463. See State v. Owen, 50 La. Ann. 1181, 24 So. 187. As to power of municipality to declare things nuisances, see §§ 332-344, herein.

263. Grossman v. Oakland, 30 Oreg. 478, 41 Pac. 5, 36 L. R. A. 593, 60 Am. St. R. 832.

264. Ward v. Little Rock, 41 Ark. 526, 48 Am. Rep. 46.

265. State v. Hunter, 106 N. C. 796, 799, 11 S. E. 366, 8 L. R. A. 529, citing Cooley Const. Lim. *p. 200.

of any ordinance upon the subject, a conviction for maintaining the same will be sustained under an ordinance providing that any obstruction of a city without proper license therefor, constitutes a common nuisance.[266] So there are many things which courts will, without proof, declare to be nuisances, among which is declared to be the use of steam for the purpose of propelling street cars along a public street in a thickly populated town where there is no legislative grant authorizing its use, and in such a case, a municipality under a general grant of power to define, declare, prevent and abate nuisances, may declare the use of steam for such a purpose to be a nuisance.[267] And municipal corporations may prohibit the use of locomotives in the public streets when such action does not interfere with vested rights.[268] So an ordinance declaring the erection of bill boards over seven feet in height to be a nuisance, has been held valid,[269] and also an ordinance condemning hitching posts, erected by the county, as a nuisance.[270] And it has likewise been determined that a city may prohibit the distribution of advertisements, hand bills or circulars where the probable and natural result of such act is that they will be thrown into the street, where they will become a source of danger to the traveling public by reason of their tendency to frighten horses. Such an ordinance is declared to be a valid and reasonable exercise of the police power.[271] So it has been decided that the city of Philadelphia has power to enact reasonable ordinances for the protection of the public in their right to the free and safe use of the highways, and that an ordinance prohibiting the casting of such things in the yards or vestibules and porches of private dwellings from

266. Wilkes-Barre v. Burgunder, 7 Kulp. (Pa.) 63.

267. North Chicago City Ry. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788. As to use of highway by railroads, see §§ 242-250, herein.

268. Railroad Company v. Richmond, 96 U. S. 521, 528, 24 L. Ed. 734. See Whitson v. City of Franklin, 34 Ind. 392; Donnaher v. The State, 8 Sm. & M. (Miss.) 649.

269. Whitmier v. Buffalo, 118 Fed. 773, holding, however, that such an ordinance is prospective only in its operation and does not include those already erected.

270. Mercer County v. Harrodsburg, 23 Ky. Law Rep. 1744, 66 S. W. 10.

271. Wettengel v. Denver, 20 Colo. 552, 39 Pac. 343.

whence they will probably be thrown or blown upon the street, not only tends to cleanliness but to safety.[272]

§ 264. **Municipal liability.**—A municipality may be liable for an injury caused by a nuisance maintained by it as well as an individual.[273] So where a city collects garbage and filth from its streets which it deposits in another street, thus creating a nuisance injuring one in the occupation of his dwelling by reason of the noxious smells and odors therefrom, it will be liable in damages for the injury so caused.[274] And such a liability likewise exists in the case of a nuisance caused by changing the grade of a street in the unauthorized construction by it of a bridge in the highway over railroad tracks.[275] And where a municipal corporation without the pretense of authority, and in direct violation of a statute, assumes to grant to a private individual the right to obstruct one of its streets while in the transaction of his private business, and, for such privilege, takes compensation, it must be regarded as itself maintaining a nuisance so long as the obstruction is continued by reason of and under such license. And it is liable for all damages naturally resulting therefrom to one who is injured in his person or property by such obstruction.[276] Again, where a duty is imposed by statute upon a municipality to keep its streets free from nuisances, a failure to perform such duty, after notice of a nuisance upon its streets, will render the muni-

272. Philadelphia v. Brabender, 201 Pa. St. 574, 51 Atl. 374; Philadelphia v. Brabender, 17 Pa. Super. Ct. 331.

273. New Albany v. Slider, 21 Ind. App. 392, 52 N. E. 626; Millett v. St. Albans, 69 Vt. 330, 38 Atl. 72. See §§ 353-358, herein.

274. New Albany v. Slider, 21 Ind. App. 392, 52 N. E. 626.

275. Phelps v. Detroit, 120 Mich. 447, 79 N. W. 640. See Schneider v. Detroit, 72 Mich. 240, 40 N. W. 329.

If done under competent legal authority a change of grade is not to be regarded as a nuisance though abutting property is damaged thereby or though the work was done negligently. Omaha v. Flood, 57 Neb. 124, 77 N. W. 379.

A constitutional provision allowing compensation for injuries caused by a change of grade does not make such change a nuisance. Atkinson v. Atlanta, 81 Ga. 625, 7 S. E. 692.

276. Cohen v. New York, 113 N. Y. 532, 21 N. E. 700, 23 N. Y. St. R. 509, 4 L. R. A. 406; Kalteyer v. Sullivan, 18 Tex. Civ. App. 488, 46 S. W. 288.

cipality liable in damages to one injured thereby. And this is held to be true, though the one who created the nuisance may be liable to the city.[277] In many of the States a municipality is, by statute, made liable for injuries caused by a defect in the highway. In construing such laws it has been decided that an obstruction is a defect within the meaning of the statute, and that a failure to remove an obstruction will render the city liable in damages to one injured thereby.[278] As is said in a New York case:

277. Zanesville v. Fannan, 53 Ohio St. 605, 42 N. E. 703. As to liability of a municipality for failure to remove or abate nuisances, see §§ 358-359, herein.

A municipal corporation is not liable for failure or refusal to abate a nuisance maintained by a private individual upon private property and not of such a character as to amount to an obstruction of a public street or to imperil the safety of travelers thereon. And this is declared to be true though the nuisance in question is a sewer which the municipal authorities allowed to be constructed by a private individual in part under the street, such part not being in itself the cause of any damage to the public or to private individuals. Dalton v. Wilson, 118 Ga. 100, 44 S. E. 830. Compare Miller v. Newport News, 101 Va. 432, 44 S. E. 712.

Permitting a platform to remain which projected from the second story of a building over the sidewalk and about eight feet above it, which was not a nuisance, has been held not to render the city liable to a person injured by a bale of hay pushed from such platform, it being declared that the municipality could rightfully presume that the platform would be properly used. Parmenter v. Marion, 113 Iowa, 297, 85 N. W. 90.

278. Rogers v. Newport, 62 Me. 101; Frost v. Portland, 11 Me. 271; Bigelow v. Weston, 3 Pick. (Mass.) 267; Snow v. Adams, 1 Cush. (Mass.) 443; Palmer v. Portsmouth, 43 N. H. 265.

Whether an object in a highway constitutes a defect within the meaning of a statute by reason of its tendency to frighten horses is declared to be a question for the jury to determine under the circumstances of the particular case. Cunningham v. Clay Turp. (Kan., 1904), 76 Pac. 907.

"Damages in one's property" through a defect in the highway has been construed as intending some injury to an article by which its value is diminished or destroyed and not as including a mere loss of one's time or an addition to his expenses. Weeks v. Shirley, 33 Me. 271.

As to notice to remove encroachments, see Sardinia v. Butler, 149 N. Y. 505, 44 N. E. 179; James v. Sammis, 132 N. Y. 239, 30 N. E. 502, 43 N. Y. St. R. 910; Smithtown v. Ely, 75 App. Div. (N. Y.) 309, 78 N. Y. Suppl. 178; West Union v. Richey, 64 App. Div. (N. Y.) 156, 71 N. Y. Suppl. 871.

"The term 'defective highways' was used in reference to their condition for public travel upon them, which their designation as a highway imports, and in view of the purpose for which they are established and maintained. And the impairment of a highway for public use may be no less such by an obstruction placed in it, than by a physical disturbance or injury to the bed of the roadway. In either case the highway is in a defective condition and evidently such condition is within the meaning of the term 'defective highways' as used in the statute." [279]

279. Whitney v. Ticonderoga, 127 N. Y. 40, 44, 27 N. E. 403, 37 N. Y. St. R. 135, per Bradley, J.

CHAPTER XIII.

WATERS.

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§ 265. **Riparian rights—Generally.**—Riparian rights are property rights within the constitution of the United States to the extent that they cannot be appropriated by another without due compensation.[1] This does not mean, however, that a private person has a right of ownership in the water, but a right to its use,[2] as a part and parcel of the land, and he is entitled to be protected therein.[3] Such rights may be for domestic,[4] or beneficial purposes

1. City of Mansfield v. Balliett, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628, given in full in note "Appendix A" at end of chap. 14. See, also, City of Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; (Grey) Simmons v. Patterson, 60 N. J. Eq. 385, 45 Atl. 995, 83 Am. St. Rep. 642. See § 62, herein.

2. Boise City Irrigation Land Co. v. Stewart (Idaho, 1904), 77 Pac. 25.

3. Cline v. Stock (Neb., 1904), 98 N. W. 454. See, also, note 1 to this section.

4. Craig v. Crafton Water Co., 141 Cal. 178, 74 Pac. 762; Pierson v. Speyer, 178 N. Y. 279, 78 N. E. 799, revg. 81 N. Y. Supp. 636, 82 App. Div. 556; Filbert v. Dechert, 22 Pa. Super. Ct. 36.

Use for domestic purposes has preference to use for irrigation. Smith v. Corbit, 116 Cal. 587, 48 Pac. 725. Examine Montrose Canal Co. v. Loutsenheiser Ditch Co., 23 Colo. 233, 48 Pac. 532.

How right acquired for domestic purposes. See Watterson v. Saldunbehere, 101 Cal. 107, 35 Pac. 43.

generally,[5] for irrigation,[6] mining, manufacturing and other purposes.[7]

§ 266. **Riparian rights—General rule.**—As a general rule every riparian proprietor is entitled to have the natural water

5. Dunn v. Hamilton, 2 S. & McL. (Sc.) 356.

Amount required for beneficial use limits appropriator of water. See Union Mill & M. Co. v. Dangberg, 81 Fed. 73; Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Riverside Water Co. v. Sargent, 112 Cal. 230, 44 Pac. 560; Nichols v. McIntosh, 19 Colo. 22, 34 Pac. 278; Becker v. Marble Creek Irrig. Co., 15 Utah, 225, 49 Pac. 892, 1119. Examine McDonald v. Lannen, 19 Mont. 78, 47 Pac. 648.

6. Rodgers v. Pitt, 129 Fed. 932; Hard v. Boise City Irrigation & Canal Co. (Idaho, 1904), 65 L. R. A. 407, 76 Pac. 331; McCook Irrigation & Water Power Co. v. Crews (Neb., 1903, 98 N. W. 996 (holding that a riparian owner has the right to make a reasonable use of a stream flowing over or along his lands for the purpose of irrigation. This right is to be measured primarily by the amount of water in the stream available for such purposes, the number of persons who may so use it, the size, situation, and character of the stream, and the nature of the region. In case a like use by other riparian owners cannot be made, the injury to a riparian owner by reason of the appropriation of the water by an irrigation enterprise is nominal only. A lower riparian owner cannot enjoin an irrigation enterprise by an upper appropriator under the statutes, merely because his damages for injury to his riparian rights have not been paid. His remedy is to sue at law for such damages. But in case a lower appropriator under the statute is materially affected by diversions of water by upper riparian owners, he may bring a suit in equity to determine the rights of all claimants to the use of the water, and to quiet his title thereto, in which the damage to riparian rights may be ascertained, and due compensation awarded. The lower appropriator may not maintain such a suit against upper riparian owners without offering to do equity by paying whatever damages accrue to such owners by reason of the appropriation. It will not be presumed that the damages in such case are nominal merely); Cornick v. Arthur, Tex. Civ. App. 73 S. W. 410.

Priorities under irrigation act of Colorado. See People, Sterling Irrig. Co. v. Downer (Colo.), 36 Pac. 787.

Relative rights for irrigation; prior and subsequent appropriators. See Montana Co. v. Gehring, 75 Fed. 384, 44 U. S. App. 629; Wells v. Kreyenhagen, 117 Cal. 329, 49 Pac. 128; Becker v. Marble Creek Irrig. Co., 15 Utah, 225, 49 Pac. 892.

7. McCarthy v. Gaston Ridge Mill & Min. Co., 144 Cal. 542, 78 Pac. 7; Watson v. Colusa-Parrot Mining & Smelting Co. (Mont., 1905), 79 Pac. 14; Evans v. Bacon, Wis., 95 N. W.

of the stream transmitted to him, without sensible alteration in its character or quality, and any invasion of this right, causing actual damage or which is calculated to found a claim which may ripen into an adverse right, entitles the injured party to the court's intervention.[8] So, every proprietor of the soil through which a stream passes, has a right to have it run in its natural current without diminution or obstruction.[9] A land owner has also the right, even without the use of a prescription, to have the water flow through the natural channels and drains convenient to it.[10] "The books are full of cases holding that equity jurisdiction is properly invoked to afford relief to a lower riparian owner where an upper proprietor defiles or corrupts a stream to such a degree as essentially to impair its purity and prevent its use for any reasonable and proper purpose to which running water may be applied. It is the right of every owner of land over which a stream of water flows, to have it flow in its natural state and with its quality unaffected. The right to a stream of water is as sacred as a right to the soil over which it flows. It is a part of the freehold, of which the owner cannot be disseized except by due process of law, and the pollution of a stream constitutes the taking of property, which may not be done without compensation."[11] So it has been declared in an Iowa case that the lower owner of land upon a stream has the right to have the water which flows from the land of an upper owner in as pure and wholesome condition as a reasonable and proper use of the stream by the upper owner

375; Young v. Bankier Distillery Co. (1893), A. C. 691, 69 L. T. 838, 58 J. P. 100—H. L. (Sc.). See subsequent sections of this chapter and "Appendix A" at end of chapter 14.

Relative rights of upper and lower riparian owners of running streams. See Schwab v. Beam, 86 Fed. 41, 1 Denver Leg. Adv. 489.

Extent of appropriation; placer location. Schwab v. Beam, 86 Fed. 41, 1 Denver Leg. Adv. 489.

Patentee of lands as appropriator; rights of at common law and with relation to subsequent appropriators. See Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 49 Pac. 495, 39 L. R. A. 107; Nevada Ditch Co. v. Bennett, 30 Oreg. 59, 45 Pac. 472.

8. Young v. Bankier Distillery Co. (1893), A. C. 691, 69 L. T. 838, 58 J. P. 100—H. L. (Sc.). See "Appendix A" at end of chapter 14.

9. Liles (Lyles) v. Cawthorne, 78 Miss. 559, 29 So. 834.

10. Overton v. Sawyer, 46 N. C. (1 Jones L.) 308.

11. City of Kewanee v. Otley, 204 Ill. 417, 68 N. E. 388.

will permit. What is a reasonable use must be determined from the circumstances of the case.[12]

§ 267. **Riparian rights—Qualification of rule—Reasonable use.**—The wants of agriculture, manufacturers, commerce, invention and of the arts and sciences require that some changes must be tolerated in the flow of natural streams in their adaptation to beneficial uses; reasonable diminution of quantity, temporary detention followed by release in increased volume, as well as some detraction from their natural purity, are necessary to be submitted to by the individual for the greater good of the public, but the water must not be diverted from its channel, or so diminished in its volume, or so corrupted and polluted as practically to destroy or greatly impair its value to the lower riparian proprietors.[13] But whether the use of a stream by one riparian proprietor is reasonable or not, in view of the rights of other proprietors, depends largely upon the circumstances of each case, and it is essentially a question of fact.[14] Again, the natural right to have the water of a stream descend in its pure state must yield to the equal right of those above. It is not, under all circumstances, an unreasonable or unlawful use of a stream to throw or discharge into it foul water or impure matter, and whether in any given case, such use would be reasonable or not, is a question for the jury.[15] Under an Illinois decision a riparian owner has the right to the reasonable use of a stream in its natural flow and purity unpolluted from sewage, that is, he is entitled to the use and enjoyment of the water, and to have the same flow in its natural and accustomed course without corruption or diversion, and the deprivation of such right without due process of law by such pol-

12. Ferguson v. The Firmenick Mfg. Co., 77 Iowa, 576, 42 N. W. 448, 14 Am. St. Rep. 319. See next following section herein.

13. Tennessee Coal, Iron & Railroad Co. v. Hamilton, 100 Ala. 253, 14 So. 167, 46 Am. St. Rep. 48. See, also, last preceding citation.

14. Platt Bros. & Co. v. Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335.

As to test of reasonableness of artificial use of water see Gehlen v. Knorr, 101 Iowa, 750, 70 N. W. 757, 36 L. R. A. 697.

15. Barnard v. Sherley, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 41 Am. St. Rep. 454, 24 L. R. A. 568-575. See note 25 to this chapter.

lution, is a nuisance and constitutes the taking of property for which compensation must be made.[16]

§ 268. **Riparian rights—Ebb and flow of tide—Reasonable use—Prior occupation.**—Riparian proprietors, who own land on the opposite sides of a water course, above ebb and flow of tide water, have a title to the land covered by the water, to the thread or centre of the stream as it is accustomed to flow in its natural channel. Each riparian proprietor has the right to a reasonable use of the water as it flows along the natural channel of the stream, for domestic, agricultural and manufacturing purposes, provided in so using it he does not prejudice or injure the rights of the other proprietors. So prior occupation of the water in a stream by one riparian proprietor, for the purpose of turning his mill, does not give him the right to divert the water from the land of the proprietor above, nor to throw the water back upon him in the channel of the stream without a grant or license to do so from such proprietor; or an enjoyment of such easement for such a length of time as will give a right under the statute of limitations.[17]

§ 269. **Riparian rights—Reasonable and unreasonable use—Convenience or necessity as to locality—Pollution of waters.**—The relative rights of an upper and lower riparian proprietor, the one for manufacturing and the other for domestic purposes, has been held to depend upon whether such use is reasonable or unreasonable under all the circumstances; and that if the upper proprietor's use is reasonable in accordance with the rights of all riparian proprietors, the lower proprietor has no remedy; so that, whether or not the throwing or discharging of waste or impure matter into the stream would be a reasonable use, must be determined by the jury. But where a business is of a private nature and not one in which the general interest of the public is involved,

16. City of Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388. See "Appendix A" in note at end of chap. 14, herein, as to taking of property and compensation.

17. Hendrick v. Cook, 4 Ga. 241. See (Grey) Simmons v. Patterson, 60 N. J. Eq. 385, 45 Atl. 995, 83 Am. St. Rep. 642.

and the location of which is determined by the question of convenience of its proprietors, and it is not conducted for the development of the natural resources of the land owned by the proprietors in the neighborhood of the stream, and it is not necessary that the manufacture should be carried on, if at all, in the locality where it is conducted to the injury of the lower riparian owner, the use made by such upper proprietor in polluting the stream is not reasonable where the damage inflicted is not slight, or insignificant or inappreciable, but substantial, measurable and great.[18] But where a work is lawful in itself, and cannot be carried on elsewhere than where nature located it, or where public necessity requires it to be, then those liable to receive injury from it have a right only to demand that it shall be conducted with all due care so as to give as little annoyance as may be reasonably expected; and any injury that may result, notwithstanding such care in the management of the work, must be borne without compensation.[19]

§ 270. **Riparian rights—Qualifications of rule—Mining and irrigation—Generally.**—"The rights of a riparian owner in and to the use of the water flowing by his land are not the same in the arid and mountainous places of the West that they are in the States of the East. These rights have been altered in many of the Western States by their constitutions and laws, because of the totally different circumstances in which their inhabitants are placed, from those that exist in the States of the East, and such alterations have been made for the very purpose of thereby contributing to the growth and prosperity of those States arising from mining and the cultivation of an otherwise valueless soil by means of irrigation. This court must recognize the difference of climate and soil, which render necessary these different laws in the States so situated."[20] Mr. Lindley in discussing the pollution of waters, etc., in connection with mines, says: "The common law

18. Muncie Pulp Co. v. Koontz, (Ind. App., 1904), 70 N. E. 999, per Black, J.

19. Barnard v. Sherley, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 41 Am. St. Rep. 454, 24 L. R. A. 568, 575. See note 25 to this chapter.

20. Clark v. Wash, 198 U. S. Rep. 361, 370.

rule regulating riparian rights has not been recognized or applied in the Pacific Sates and territories." This departure had its origin in the necessity for utilizing running streams for the purpose of mining and washing ores. "In all the States and territories of the West where mining is a prominent and permanent industry, we find the right of appropriation and the use of running water for mining purposes, to some degree at least, well recognized and established." [21] Mr. Snyder in his work on mines says: "He who first appropriates water and puts it to a beneficial use, to the extent so used, whether for hydraulic mining or for propelling machinery, acquires a superior right to it, to the extent that he has put it to a beneficial use, to the exclusion of any other appropriator, whether the same is conveyed to his property through surface or sub-surface channels; and he is entitled to have it flow without material interruption, and is protected from damage by subsequent locators above or below him; and where he has diverted it for a particular claim, he may afterwards change the place of diversion so as to use it on another claim, without losing his priority of right." [22] But under the Georgia code, an upper riparian owner cannot lawfully pollute or adulterate the water of the stream so as to render it unfit for use by a lower owner, without being liable for damages. The former has the right to use the water while it is on his land, but not in such manner as to deprive the next owner of the enjoyment of it; and if such use, by washing ore adulterates it, and the next owner is thereby injured, he is entitled to damages, though the stream be more useful for mining than for domestic purposes.[23] And under a Montana decision the right of one who appropriates water to foul or obstruct, and to some extent to diminish the quantity of water in a stream, must be determined by the particular facts and circumstances of such case, and may, where unavoidable, be permitted to a reasonable extent, especially where the statute provides that one must so use his own rights as not to infringe upon the rights of another. But waters cannot be polluted to any greater

21. 2 Lindley on Mines (2nd ed.), § 841. See, also, discussion as to deposit of tailings and refuse on another's land, id. §§ 843 *et seq.*

22. Snyder on Mines (Ed. 1902), § 330, p. 299.

23. Satterfield v. Rowan, 83 Ga. 187, 9 S. E. 677.

extent than permitted by law. A proprietor acquires no title to the water but only the right to use the same, and no person, natural or artificial, has a right, directly or indirectly, to cover his neighbor's land with mining debris, sand or gravel or other material so as to render it valueless, and the doing of such acts to such an extent constitutes a nuisance both at the common law and under the statute.[24] In an Indiana case,[25] the court, per Howard J., says: "The general rule in England is, that a person discharging noxious substances into a stream will be liable to the riparian owners lower down for any damage occasioned; yet some exception seems to be made in favor of mining operations. Bainbridge[26] says: 'It should also be remembered that the prosperity of a mining country and its inhabitants depends upon the successful efforts of the adventurer. The value of all property in the vicinity of mines is inseparably associated with the spirit of adventure. The miner, therefore, should not be harassed in his operations by

24. Chessman v. Hale, Mont., 1905, 79 Pac. 254, Civ. Code, §§ 1880, 4550, 4605, Code Civ. Proc. § 1300.

Right to appropriate water for irrigation purposes. See note 98 Am. Dec. 543-545.

Rights acquired by prior appropriator of waters of stream. See note 43 Am. Dec. 269-283.

25. Barnard v. Sherley, 135 Ind. 547, 555, 34 N. E. 600, 35 N. E. 117, 24 L. R. A. 568, 41 Am. St. Rep. 454. See second trial report of this case, 151 Ind. 161, 41 L. R. A. 737, 47 N. E. 67 (holding that where the special findings in an action for damages on account of the pollution by sewage from a sanitarium of a spring branch running through the lands of plaintiff contain statements to the effect that the water in such stream, after receiving the sewage, was comparatively harmless, and that plaintiff had been able to sell her lands at a price equal to that received for lands of a similar character in other portions of the city in which plaintiff's lands were situated, neutralize the statement in the finding that she was damaged; and also holding that where the owner of a sanitarium allows water from an artesian well which has been used in such sanitarium for bathing, to flow into a stream running through the lands of an adjoining landowner, the damage sustained thereby by such landowner is *damnum absque injuria* where such stream was the only natural and available outlet. "The principles laid down, exemplified and elucidated when this case was in this court before, more than warrant us in adjudging that the court erred in its conclusions of law. We need not repeat what was then said, but refer to it as the law of this case," per McCabe, C. J.

26. Law of Mines (3rd ed.), 517.

claims of an unsubstantial or imaginary character; for the benefits he confers generally far surpass the injuries he may commit.' In 'Leading Cases on Mines,'[27] the exception as to mineral products is also made. 'But a right to throw refuse from mines into a natural stream, or discharge into it water which has been used for the precipitation of minerals and rendered noxious, may be acquired by prescription, custom or user. The same rule applies to smelting and washing processes.' In this country the severity of the English rule is still further relaxed: 'If one builds a dam upon his own premises and thus holds back and accumulates the water for his benefit, or if he brings water upon his premises into a reservoir, in case the dam or the banks of the reservoir give way and the lands of a neighbor are thus flooded, he is not liable for the damage without proof of some fault or negligence on his part.'[28] . . . The right to flowing water is a right incident to property in land, and while it is a right common and equal to all through whose land it runs, yet, as one of the gifts of Providence, each proprietor has a right to a just and reasonable use of it as it passes through his land. What is such a just and reasonable use may often be a difficult question depending on various circumstances.[29] Sewage and waste material may be cast into streams if material injury is not thereby caused. The right of one proprietor to have the stream descend to him pure, must yield in a reasonable degree to the right of the upper proprietors, whose occupation of their own lands, and whose use of the water for mill, manufacturing, domestic, or other purposes, will tend to make the water more or less impure. So it is of public importance that proprietors of useful manufactories should not be held responsible for slight injuries, or even some degree of interference with agriculture. In regard to some waste deposits in such streams, there would seem to be no question. The uniform practice, the convenience, and, in some instances, the indispensable necessity, would seem sufficient to decide such cases.[30] . . . The natural right

27. Blanchard & Weeks' Notes, 721.

28. Citing Losee v. Buchanan, 51 N. Y. 476. See §§ 14, 44, 89, 92, herein.

29. Citing Elliott v. Fitchburg R. R. Co., 10 Cush. (Mass.) 191.

30. Citing Gould Waters, § 220.

to have the water of a stream descend in its pure state, must yield to the equal right of those above. Their use of the stream for mill purposes for which they may lawfully use it, will tend to render it more or less impure. The water may thus be rendered unfit for many uses for which it had before been suitable; but so far as that condition results from a reasonable use of the stream, in accordance with the common right, the lower riparian proprietor has no remedy. When the population becomes dense, and towns or villages gather along its banks, the stream naturally suffers still greater deterioration. Against such injury, incident as it is to the growth and industrial prosperity of the community, the law affords no redress. So, in cities and towns, with their numerous inhabitants and diversified business, with their mills, shops and manufactories, with their streets and sewers, all the products and means of a high civilization, it would be impossible that the pure streams that flow in from the farmsides should remain uncontaminated; and those that live upon the lower banks of such streams must, for the general good, abide the necessary results of such causes.[31] That it is not, under all circumstances, an unreasonable or unlawful use of a stream to throw or discharge into it waste or impure matter; and that whether in any given case such use would be reasonable or not, is a question for the jury."[32] Mr. Kinney, in his work on Irrigation, says: "Any use of the stream which defiles or corrupts it to such a degree as to essentially impair its purity and usefulness for any of the purposes to which the water is applied by the prior appropriator, is an invasion of the private rights, for which he is entitled to a remedy. But the natural right of an appropriator to have the stream descend to him in its pure state must yield in a reasonable degree to the rights of those who have located above upon the stream subsequent to him. This is especially true where the object of his appropriation is that of irrigation, as it is of public importance that the proprietor of useful manufactories should be held responsible only for substantial injury caused by their works, and not for slight inconveniences or occasional annoyances, or even some degree of interference with irrigation or agricultural pursuits. As

31. Citing Merrifield v. City of Worcester, 110 Mass. 216.

32. Citing Angell Watercourses (7th ed.), § 140d.

the population grows more dense along the streams in the arid west, it is becoming more and more an impossibility to keep the water of the streams in their naturally pure condition. And when an injunction is sought to stop large and expensive works, which cause the waters of a stream to be polluted, it must clearly appear that the legal remedy of the prior appropriator is entirely inadequate and that he will suffer irreparable injury from the continuance of the pollution to such an extent that his vested rights are in jeopardy." [33]

§ 271. **Riparian rights—Artificial water course.**—A water course, though artificial, may have been originally made under such circumstances and have been so used as to give all the rights that the riparian proprietors would have had if it had been a natural stream; and, therefore, in an action by one riparian proprietor against another for the pollution and diversion of a water course, it is a misdirection to tell the jury that if the stream were artificial and made by the hand of man, the plaintiff could have no cause of action.[34]

§ 272. **Rights as to navigable waters—Generally.**—A navigable river is a great public highway in which the people of the State have a paramount and controlling right, consisting chiefly of a right of property in the soil and a right to the use of the water flowing over it for the purposes of transportation and commercial intercourse. This right of the State is subject, however, to rights surrendered to the general government, and the State may grant the soil to an individual subject to the paramount right of the people to a use of the highway, but a right to the use of the navigable waters is inalienable. Great water highways are governed by the same general rules applicable to highways on land.[35]

33. Kinney on Irrigation (Ed. 1894), § 250, pp. 401, 402.

Common law doctrine of riparian rights not made inapplicable by necessity of irrigation. See Benton v. Johncox, 17 Wash. 277, 61 Am. St. Rep. 912, 39 L. R. A. 107, 49 Pac. 495.

34. Sutcliffe v. Booth, 32 L. J. Q. B. N. S. 136.

35. People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152. See §§ 63, 212 *et seq.*, herein.

Navigable stream a public highway and public place. State v. Wabash Paper Co., 21 Ind. App. 167, 1 Repr. 234, 51 N. E. 949, 48 N. E. 653.

As to essentials and test of

§ 273. **Obstruction of navigable waters.**—A State cannot seri-

navigability, see St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. ; The Daniel Ball, 10 Wall. (U. S.) 557; Marrigault v. S. M. Ward & Co., 123 Fed. 707; Chisolm v. Caines, 67 Fed. 285; Smith v. Fonda, 64 Miss. 551, 1 So. 757; State v. Twiford, 136 N. C. 603, 48 S. E. 586; Heyward v. Farmers Min. Co., 42 S. C. 138, 20 S. E. 64, 28 L. R. A. 53, 19 S. E. 963, 28 L. R. A. 42; Webster v. Harris, 111 Tenn. 668, 59 L. R. A. 324, 69 S. W. 782.

What are navigable waters. See Cardwell v. American River Bridge Co., 113 U. S. 205, 28 L. Ed. 959, 5 Sup. Ct. 423; Escanaba Co. v. Chicago, 107 U. S. 678; Georgetown v. Alexandria Canal Co., 12 Pet. (U. S.) 91; Rundle v. Delaware & R. Canal Co., 14 How. (U. S.) 80; The Montello, 11 Wall. (U. S.) 411; Chisolm v. Caines, 67 Fed. 285; Lawton v. Connor, 40 Fed. 480, 7 L. R. A. 55; Wallamet Iron Bridge Co. v. Hatch, 9 Sawy. (U. S. C. C.) 643, 19 Fed. 347; Olive v. State, 86 Ala. 88; Sullivan v. Spotswood, 82 Ala. 103, 2 So. 716; Miller & Lox v. Enterprise Canal & Land Co., 142 Cal. 208, 75 Pac. 770; Goodwill v. Bossier Parish, 38 La. Ann. 752; Woodman v. Pitman, 79 Me. 456, 10 Atl. 321; Crookston Waterworks Power & Light Co. v. Sprague, 91 Minn. 461, 98 N. W. 347, 99 N. W. 420, under Gen. Stat. 1894, § 2385; State v. Baum, 128 N. C. 600, 38 S. E. 900; Hodges v. Williams, 95 N. C. 33; Hallock v. Suitor, 37 Oreg. 9, 60 Pac 384; Webster v. Harris, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324; Southern Ry. Co. v. Ferguson, 105 Tenn. 562, 59 S. W. 343; Monroe Mill Co. v. Menzel, 35 Wash. 487, 77 Pac. 813; Willow River Club Co. v. Wade, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305; Falls Mfg. Co. v. Oconto River Improvement Co., 87 Wis. 134, 58 N. W. 257.

What are not navigable waters. See Leovy v. United States, 177 U. S. 621, 20 Sup. Ct. 797, 44 L. Ed. 914, rev'g 34 C. C. A. 392, 92 Fed. 344; United States v. Rio Grande Dam & I. Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136, rev'g 9 N. M. 292, 51 Pac. 674; Manigault v. S. M. Ward & Co., 123 Fed. 707; Toledo Shooting Co. v. Erie Shooting Club, 33 C. C. A. 233, 62 U. S. App. 644, 90 Fed. 680; Bayzer v. McMillan, 105 Ala. 395, 16 So. 923; Morrison Bros. & Co. v. Coleman, 87 Ala. 655, 5 L. R. A. 384; People, Ricks Water Co. v. Elk River Mill & L. Co., 107 Cal. 221, 40 Pac. 531; Ligare v. Chicago, M. & N. R. Co., 166 Ill. 249, 46 N. E. 803; Murray v. Preston, 21 Ky. L. Rep. 72, 50 S. W. 1095; Bendick v. Scobel, 107 La. 242, 31 So. 703; Baldwin v. Erie Shooting Club, 127 Mich. 659, 8 Det. Leg. N. 535, 87 N. W. 59 (bay or arm of great lakes); Haines v. Hall, 17 Oreg. 165, 3 L. R. A. 609; Griffith v. Holmes, 23 Wash. 347, 63 Pac. 239; East Hoquiam Boom & L. Co. v. Neeson, 20 Wash. 142, 54 Pac. 100.

Stream to be navigable in legal sense must be of such a character as to be useful to the public as a channel of travel and commerce. Neaderhouser v. State, 28 Ind. (28

ously obstruct the navigation of those streams which are channels

Harr.) 258. See Weise v. Smith, 3 Oreg. 445, 8 Am. Rep. 621.

The term "navigable waters of the United States" has reference to commerce of a substantial and permanent nature to be conducted thereon. Leovy v. United States, 177 U. S. 621, 632, per Shiras, J., reviewing decisions.

Channel of slough of the sea may be navigable in a legal sense where the tide ebbs and flows therein twice each day, and during such period the channel can be and is used as a public highway for boats, scows and other ordinary modes of water transportation for general commercial purposes, and especially for rafting, booming, and floating and towing of logs, so that navigation cannot be obstructed therein. The fact that the State has sold the bed of such slough to a private person confers no right upon him to obstruct such navigable waters so as to interfere with the rights of the public therein, and a person specially damaged by such obstruction is entitled to relief by injunction. Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807.

That title or fee in State as to soil of navigable waters, see Mobile Transp. Co. v. City of Mobile, 187 U. S. 479, 47 L. Ed. 266, 23 Sup. Ct. 170, aff'g 128 Ala. 335, 30 So. 645; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 33; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. 110, 47 Alb. L. J. 129; Martin v. Waddell, 16 Pet. (U. S.) 367; Smith v. Maryland, 18 How. (U. S.) 71; Den v. Jersey City, 15 How. (U. S.) 426; Weber v. Harbor Comm'rs, 18 Wall. (U. S.) 57; Leverick v. City of Mobile, 110 Fed. 170; Mission Rock Co. v. United States, 109 Fed. 763, 48 C. C. A. 641; Mobile Transp. Co. v. City of Mobile, 128 Ala. 335, 30 So. 645, aff'd 187 U. S. 479 (as to title of Alabama to land below high water mark see, also, City of Mobile v. Sullivan Timber Co., 129 Fed. 298, 62 C. C. A. 412); San Francisco Sav. Union v. Petroleum & Min. Co., 144 Cal. 134, 77 Pac. 823; Chicago Transit Co. v. Campbell, 110 Ill. App. 366; People v. Silberwood, 110 Mich. 103, 3 Det. L. N. 302, 32 L. R. A. 694, 67 N. W. 1087 (Lake Erie); Lamprey v. State, 52 Minn. 181, 47 Alb. L. J. 204, 18 L. R. A. 670, 53 N. W. 1139 (Lake); State, Citizens Electric L. & P. Co. v. Longfellow, 169 Mo. 109, 69 S. W. 374; Simpson v. Moorehead, 65 N. J. Eq. 623, 56 Atl. 887; Amos v. Norcross, 58, N. J. Eq. 256, 43 Atl. 195; Woodcliff Land Imp. Co. v. New Jersey Shore Line R. Co. (N. J.), 60 Atl. 44; Simmons v. City of Patterson, 60 N. J. Eq. 385, 48 L. R. A. 717, 45 Atl. 995; City of New York, In re, 168 N. Y. 134, 61 N. E. 158; Trustees, etc., of Brookhaven v. Smith, 98 App. Div. 212, 90 N. Y. Supp. 646; Muckle v. Good, 45 Oreg. 230, 77 Pac. 743; New York, N. H. & Hfd. R. Co. v. Horgan, 25 R. I. 408, 56 Atl. 179; Webster v. Harris, 111 Tenn. 668, 59 L. R. A. 324, 69 S. W. 782; Taylor v. Commonwealth, 102 Va. 759, 47 S. E. 875; Illinois Steel Co. v. Bilot, 109 Wis. 418, 84 N. W. 855, 85 N. W. 402, 83 Am. St. Rep. 905; Nash v. Newton, 30 N. B. 610. (Fee in crown.)

Tidelands of territories; para-

of inter-State trade, as Congress has interfered to regulate com-

mount title in United States. See Carroll v. Price, 81 Fed. 137.

Sea adjoining New York and New Jersey; as to rights of federal government and of States, see, generally, Hamburg American Steamship Co. v. Grube, 196 U. S. 407.

As to rights of riparian or shore owners—navigable waters, see Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. Ed. 1018, 13 Sup. Ct. 1101, 47 Alb. L. J. 129; Whitehurst v. McDonald, 52 Fed. 633, 8 U. S. App. 164, 3 C. C. A. 214; Webb v. Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62; Minneapolis Mill Co. v. St. Paul Water Comm'rs, 56 Minn. 485, 58 N. W. 33; Lamprey v. State, 52 Minn. 181, 47 Alb. L. J. 204, 18 L. R. A. 670, 53 N. W. 1139 (Lake); Perkins v. Adams, 132 Mo. 131, 33 S. W. 778; Attorney-Gen'l v. Central R. Co. of New Jersey, N. J. Eq. , 59 Atl. 348 (under wharf act 1851, Gen. Stat. pp. 3753, 3756); Sage v. New York, 154 N. Y. 61, 38 L. R. A. 606, 47 N. E. 1096, 30 Chicago Leg. N. 89, aff'g 10 App. Div. 294, 41 N. Y. Supp. 938; State v. Twiford, 136 N. C. 603, 48 S. E. 586; Pollock v. Ship Bldg. Co., 56 Ohio St. 655, 47 N. E. 582, 38 Ohio L. J. 117; Gawn v. Wilson, 9 Ohio S. & C. P. Dec. 683, 7 Ohio N. P. 33; Webster v. Harris, 111 Tenn. 668, 59 L. R. A. 324, 69 S. W. 782; Re Provincial Fisheries, 26 Can. S. C. 444. (Great lakes and navigable rivers.)

As to riparian owner's paramount and qualified right of passage on navigable stream, see Coyne v. Mississippi & R. R. Boom Co., 72 Minn. 533, 71 Am. St. Rep. 508, 75 N. W. 740, 41 L. R. A. 494.

"Concurrent jurisdiction" or control under acts of congress construed, see Roberts v. Fullerton, 117 Wis. 222, 93 N. W. 1111.

That navigation and commerce paramount rights, see St. Anthony Falls Water Power Co. v. St. Paul's Water Comm'rs, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497; Mission Rock Co. v. United States, 109 Fed. 763, 48 C. C. A. 641; Chisolm v. Caines, 67 Fed. 285; People v. Silverwood, 110 Mich. 103, 3 Det. L. N. 302, 32 L. R. A. 694, 67 N. W. 1087 (Lake Erie); Sage v. New York, 154 N. Y. 61, 38 L. R. A. 606, 47 N. E. 1096, 30 Chicago Leg. N. 89, aff'g 10 App. Div. 294, 41 N. Y. Supp. 938; Pollock v. Cleveland Ship Bldg. Co., 56 Ohio St. 655, 47 N. E. 582, 38 Ohio L. J. 117. See as to public rights generally Trustees, etc., of Brookhaven v. Smith, 98 App. Div. 212, 90 N. Y. Supp. 646; State v. Twiford, 136 N. C. 603, 48 S. E. 586; Webster v. Harris, 111 Tenn. 668, 69 S. W. 782, 59 L. R. A. 324.

That navigable waters forever free in United States to citizens, see Cardwell v. American River Bridge Co., 113 U. S. 205, 28 L. Ed. 959, 5 Sup. Ct. 23; Leverich v. City of Mobile, 110 Fed. 170. But examine Pennsylvania v. Wheeling, etc., Bridge Co., 18 How. (U. S.) 421, 15 L. Ed. 435.

Right of public to use tidelands. See Rhode Island Motor Co. v. City of Providence (R. I.), 55 Atl. 696.

merce upon them.[36] And where Congress, exercising its power to declare what constitute obstructions to navigable waters, has prohibited the putting of certain matter into streams which will be carried in suspension into the ocean, the doing of such prohibited acts will be enjoined.[37] But obstructions and nuisances of navigable streams, even though offenses against a State, are not such against the United States in the absence of a direct statute bringing such offenses within the scope of its laws.[38] Since those using a public navigable stream as a highway for vessels have the primary and paramount right to it, every hindrance to the free passage of vessels is *prima facie* a nuisance.[39] But navigation must be materially interrupted to constitute a nuisance,[40] and the question of nuisance or obstruction rests upon fixed laws.[41] Amongst obstructions in navigable rivers which constitute nuisances are nets in the channel;[42] a floating elevator;[43] an abandoned and sunken vessel;[44] a shanty or jo-boat located below high-water mark;[45] a

36. Depew v. The Board of Trustees of the Erie & Wabash Canal, 5 Ind. 8, 11.

37. United States v. North Broomfield Gravel Min. Co., 81 Fed. 243. See U. S. Stat. at L. c. 496, p. 209; United Alkali Co. v. Simpson, 63 L. J. M. C. 141 (1894) 2 Q. B. 116, 42 Wkly. Rep. 509, 58 J. P. 607, 71 L. T. Rep. N. S. 258, 10 R. 235.

38. United States v. Bellingham Bay Boom Co., 81 Fed. 658, 26 C. C. A. 547, 48 U. S. App. 443. See, also, Williamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. Ed. 629, 8 Sup. Ct. 811, per Bradley, J.

39. Georgetown v. Alexandria Canal Co., 12 Pet. (U. S.) 91; Blanchard v. Western Un. Tel. Co., 60 N. Y. 510, 1 Am. Elec. Cas. 176, rev'g 67 Barb. (N. Y.) 228, 3 T. & C. 775. See last preceding section herein and note.

Any obstruction of navigation is nuisance. Georgetown v. Alexandria Canal Co., 12 Pet. (U. S.) 91.

40. Woodman v. Pitman, 79 Me. 456, 10 Atl. 351, and cases cited.

41. Yates v. Milwaukee, 10 Wall. (U. S.) 497, 19 L. Ed. 984.

42. Reyburn v. Sawyer, 135 N. C. 328, 47 S. E. 761, 65 L. R. A. 930.

43. 2 Hawk. P. C. C. 7, § 11; Neil v. Henry, Meigs (Tenn.), 17, 33 Am. Dec. 125.

44. Detroit Water Comm'rs v. Detroit, 117 Mich. 458, 76 N. W. 70, 5 Det. L. N. 305. See McLean v. Matthews, 7 Ill. App. 599. But examine Cummins v. Spruance, 4 Harr. (Del.) 315; King v. Watts, 2 Esp. 675.

City not liable for non-removal of sunken vessel when not compelled to remove obstructions from navigable waters, nor to enforce an ordinance providing for such removal. Coonley v. Albany, 132 N. Y. 145, 30 N. E. 382, 43 N. Y. St. R. 549.

45. Dzik v. Bigelow (Pa. C. P.), 27 Pitts. L. J. N. S. 360.

floating storehouse;[46] a bridge constructed without legal authority for a private purpose;[47] a boom for logs constructed across a navigable river without legislative authority even though a swing boom is attached;[48] and an obstruction which prevents floating logs.[49] It also constitutes an indictable nuisance to obstruct navigable water by driving down stakes two and a half feet apart with their tops rising three or four feet above the surface of the water with a gate near the centre of the stream kept locked so as to exclude the public from using the waterway. The question of navigability of a stream is, however, ordinarily one for the jury, and the capability of its being used for the purposes of trade and travel in the usual and ordinary modes is the test and not the extent and manner of such use. The control of navigable waters belongs to the public and is not appurtenant to the owner of the shore.[50] The public have a right of way in navigable streams within the State, which right cannot be materially interrupted or interferred with by the owners of the banks of such streams.[51] But an encroachmnt on the banks of a navigable river is not necessarily a nuisance, and the jury ought, on the facts of the case, to say whether the public are in any way inconvenienced, for if they are not, then it is not a nuisance. This rule applies to buildings and embankments along the side of a river parallel with its banks and projecting into the stream.[52] It is held in an English case that that which is not a nuisance at the time it was done, cannot become so by length of time and that this rule applies to butts or heaps of stone made use of in throwing and landing nets which had been in a river navigable at the time of suit for a time before the memory of man; and that the presumption was that at the time

46. Wetmore v. Atlantic White Lead Co., 37 Barb. (N. Y.) 70.

47. People, Howell v. Jessup, 28 App. Div. 524, 51 N. Y. Supp. 228. See § 274, herein, as to bridges.

48. Pascagoula Boom Co. v. Dickson, 77 Miss. 587, 28 So. 724; Const. § 81. See, also, Union Mill Co. v. Shores, 66 Wis. 476.

49. Spokane Mill Co. v. Post, 50 Fed. 429.

50. State v. Twiford, 136 N. C. 603, 48 S. E. 586; State v. Narrows Island Club, 100 N. C. 477, 5 S. E. 411, 6 Am. St. Rep. 618. See Harlan & H. Co. v. Paschall, 5 Del. Ch. 435.

51. Cox v. The State, 3 Blackf. (Ind.) 193.

52. King v. Shepard, 1 L. J. O. S. K. B. 45, 25 R. R. 559.

they were built the river was not navigable, and therefore that they were not a nuisance.[53] An obstruction of a navigable stream is not a nuisance where it is merely temporary and for the purpose of remodeling a defective lock in a dam.[54]

§ 274. **Bridges.**—Subject to limitations existing or imposed in relation to navigable waters by federal or State constitutions or by federal laws and until the power of Congress over navigable waters and to regulate commerce is called into action, a State has power to authorize the erection, construction and maintenance of bridges over navigable waters within the State. Such erection so authorized, should not, however, materially obstruct navigation. Navigable waters within a State are both State and national in their character and subject to the paramount control of the general government when through Congress it chooses to exercise such authority. This rule is in harmony with that which permits Congress either of itself or by joint action with a State, to authorize the construction of bridges over navigable waters and also with that which recognizes or has recognized bridges between States as being lawfully constructed under the concurrent authority of the States interested.[55] In a case in the United States Supreme Court,[56]

53. King v. Bell, 1 L. J. O. S. K. B. 42.

54. State v. Charleston Light & Water Co., 68 S. C. 540, 47 S. E. 979. Examine Northern Transp. Co. v. Chicago, 99 U. S. 635, 25 L. Ed. 336; Green Nav. Co. v. Chesapeake, etc., Co., 88 Ky. 1, 10 Ky. L. R. 625, 10 S. W. 6.

55. Covington & Cincinnati Bridge Co. v. Kentucky, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962. Point (1) minority opinion concurring in result. Luxton v. North River Bridge Co., 153 U. S. 525, 38 L. Ed. 808, 14 Sup. Ct. 891 (Congress may create corporation to build bridge across navigable river between two states and statute is constitutional); Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. Ed. 629, 8 Sup. Ct. 1 (State has plenary power until Congress acts and Congress not precluded by act of State or individuals from assuming control and abating obstructions or preventing others); Hamilton v. Vicksburg, Shreveport & Pac. Rd., 119 U. S. 281 (reconstructing bridge); Dietrich v. Schreman, 117 Mich. 298, 75 N. W. 618 (only limitations are State and federal constitution and federal laws); State v. Leighton, 83 Me. 419, 22 Atl. 380; Baltimore v. Stole, 52 Md. 435 (construction of legislative act not designating size of draw of bridge); Dover v. Portsmouth Bridge, 17 N. H. 200 (State may authorize, if powers and

it is said: "In that case[57] we recognized the doctrine as long established that the authority of a State over navigable waters entirely within its limits was plenary, subject only to such action as Congress may take in execution of its power under the constitution to regulate commerce among the several States. After referring to Lake Shore and Michigan Railway v. Ohio,[58] we said that if Congress had intended by its legislation, prior to that decision, to assert the power to take under national control, for every purpose, and to the fullest possible extent, the erection of structures in the navigable waters of the United States that were wholly within the limits of the respective States, and to supersede entirely the authority which the States, in the absence of any action by Congress, have in such matters, such a radical departure from the previous policy of the government would have been manifested by clear and explicit language. In the absence of such language it should not be assumed that any such departure was intended. We

action of United States interpose no objection); People v. Kelly, 76 N. Y. 475 (Congress may authorize construction and determine extent of interference and devolve upon secretary of war to approve or prescribe plan).

The power of Congress to regulate navigable waters" not expressly granted in constitution, but is a power incidental to express 'power to regulate commerce with foreign nations, among the several States and with the Indian tribes;' and with reference to which the observation was made by Chief Justice Marshall, that 'it is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between dierent parts of the same State, and which does not extend to or affect other States.'" Leovy v. United States, 177 U. S. 631 and 632, per Shiras, J., citing Gibbons v. Ogden, 9 Wheat. 1, 194.

"That a State has power to authorize the building of bridges over navigable waters, although they may to a certain extent obstruct navigation, is a well established doctrine. This power, however, is held to be subject to the exercise of the power of Congress to regulate navigation." 2 Amer. & Eng. Ency. of Law (1st Ed. -887) p. 546, and cases cited. Article "Bridges" by Joseph A. Joyce.

Diminishing or impeding flow of streams, by bridges or dams; the right generally; detention for reasonable use, etc., see note 85 Am. St. Rep. 707.

56. Montgomery v. Portland, 190 U. S. 89, 47 L. Ed. 965, 89 Sup. Ct. 107.

57. Cummings v. City of Chicago, 188 U. S. 410, 23 Sup. Ct. 472.

58. 165 U. S. 365, 366, 368 (1896), 41 L. Ed. 747, 748, 17 Sup. Ct. 357.

do not overlook the long-settled principle that the power of Congress to regulate commerce among States 'is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution.'"[59] It is declared in a early case that a State has power to regulate the use of public roads within its jurisdiction, and to authorize the construction of bridges and such other improvements as are not incompatible with the use of the stream as a public highway. If a bridge is built, and it is necessary for the convenience of the public, and does not prevent the free use of the stream as a public highway, although it may have occasioned some slight inconvenience to those who had been in the habit of navigating the stream by obliging them to take some additional precautions in passing it, it will not, therefore, be necessarily considered a nuisance.[60] Again, where both the State and the national government authorize the erection of a bridge over navigable waters, it does not constitute a nuisance which can be abated as such.[61] The Wheeling Bridge case,[62] which has been much discussed, decides that a Virginia statute authorizing a bridge over the Ohio which was an obstruction to commerce, constituted no protection, and a bridge over the Ohio being a nuisance, the Federal Supreme Court enjoined it as a nuisance at the instance of the State of Pennsylvania, and that where a structure constitutes a nuisance there is no room to calculate between its benefits and injuries. But subsequently[63] it was also decided that an act of Congress declaring a bridge to be a lawful structure at its then height, was constitutional and also that a decision of the court prior to such statute declaring the bridge an obstruction under then existing regulations of commerce, was so far modified by the enactment as to be no longer enforceable. So where an existing bridge over a river dividing two States

59. Gibbons v. Ogden, 9 Wheat. 1, 196, 6 L. Ed. 70; Brown v. Maryland, 12 Wheat. 419, 446, 6 L. Ed. 678, 688; Brown v. Houston, 114 U. S. 630, 29 L. Ed. 260, 5 Sup. Ct. 1091.

60. Williams v. Beardsley, 2 Carter (Ind.), 591.

61. Miller v. Mayor of New York, 109 U. S. 385, 27 L. Ed. 971, 3 Sup. Ct. 228.

62. Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. (U. S.) 518.

63. 18 How. (U. S.) 421.

is declared by statute to be a lawful structure and a post route, such enactment is constitutional and abates a pending action to declare the bridge a nuisance.[64] In a very recent decision,[65] the case of Wheeling Bridge[66] is briefly discussed and the court, per Holmes, J., says: "It hardly was disputed that Congress could deal with the matter under its power to regulate commerce;" that the compact between Virginia and Kentucky when the latter was let into the Union made the use and navigation of the Ohio as to the territory of either State lying thereon free and common to the citizens of the United States; and that that compact had, by sanction of Congress, become a law of the Union, and a State law which violated it was unconstitutional and in conflict with the acts of Congress, which were the paramount law. Holmes, J., also said: "In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of" the State.[67] "There are three cases on which authority from the Legislature is necessary to erect a bridge across a stream: First, where the stream is navigable; second, where the State owns the bed of the stream; and third, where the right to take toll is desired. Impassible obstructions may be authorized by a State upon either tidal or fresh-water streams within its limits and navigable to coasting vessels, while the power conferred upon Congress to regulate commerce remains dormant and unexercised by legislation upon the subject; and the mere grant of commercial power, anterior to any action of Congress under it, is not, in this respect, exclusive of State authority. Even when an impassible structure like a dam might be removable as obstructing interstate commerce, a bridge, erected under authority from a State, which, having draws or openings, affords opportunities for vessels to pass, but which limits the navigation, at a point below where the coasting trade is carried on by licensed vessels, to the space occupied by the

64. Clinton Bridge, 10 Wall. (U. S.) 454.

65. Missouri v. Illinois (Chicago Drainage Case), 200 U. S. part 5, National Corp. Rep. (1906) 46, given in § 299, herein.

66. Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. (U. S.) 518, 14 L. Ed. 249; 18 How. (U. S.) 421, 15 L. Ed. 435.

67. See § 299 herein for full statement of facts and law of the Missouri v. Illinois case.

draw or opening, would not be condemned, although additional precautions in passing it may be required on the part of vessels, or temporary delays may be thereby caused by navigators. A bridge so authorized, having a sufficient opening, or being of sufficient height, at the usual state of the water or of ordinary freshets, to permit the passage of any vessel capable of navigating the stream, will not be condemned as interfering with the powers of Congress, even in cases where Congress has regulated navigation upon the river; and the Legislature of a State may empower persons or corporations to erect and maintain bridges without draws over its navigable waters, as well as dams, if the statute giving such power does not interfere with the regulations of Congress on the same subject. Such authority will be a protection from indictment brought upon the ground that the structure is a public nuisance, and is valid, although no indemnity is provided for those who have been accustomed to navigate in the waters which are thereby enclosed."[68] A State authorization to erect and maintain a bridge warrants its proper maintenance by reconstructing, replacing or renewing parts thereof when requisite to adapt and make it fit for its intended purposes, its safety, and business necessities, where its form remains substantially unchanged, and the authorization contains no restrictions to the contrary; and this is so, even though the State's control over the river at the time of the grant is subsequently transferred to and assumed by the United States, and an enactment is passed regulating the construction and form of bridges over said streams.[69] And where a bridge is rebuilt in pursuance of an authority conferred by law for the benefit of the public and the method employed does not unreasonably or unnecessarily obstruct navigation, it cannot be held that a public nuisance is created such as will warrant recovery of special damage claimed to have been sustained by a shipper where reasonable provision has also been made calculated to obviate such alleged or like claimed injuries.[70] But it is held that a bridge over

68. Gould on Waters (3d ed.), § 132.

69. United States v. Cincinnati & M. V. R. Co., 67 C. C. A. 335, 134 Fed. 353. See, also, Hamilton v. Vicksburg, Shreveport & Pac. R. 119 U. S. 281.

70. Rhea v. Newport News & M. V. R. Co., 50 Fed. 16, 23, 12 Ry. & Corp. L. J. 3.

a navigable stream is not indictable as a nuisance where it is erected for a public purpose, leaves a reasonable space for the passage of vessels and produces a public benefit;[71] although where a river is declared by the Legislature to be navigable between certain points it constituts a nuisance to build a bridge across the same between such points, so as to prevent the passage of boats.[72] If a bridge is unlawfully maintained across a navigable river and it prevents the passage of vessels used for the transportation of products from a manufactory on the river and so necessitates transshipment, a special injury and nuisance exist, and the latter should be abated at the suit of the owner of the factory and vessels.[73] And a draw bridge company cannot obstruct the navigation of a river where its charter does not so authorize; and if boats cannot avoid injury from the bridge by the use of skill and care it is an obstruction.[74] It is held in a Federal case that although the secretary of war's approval may be requisite before a bridge can be erected over navigable waters under act of Congress, such enactment does not take away from a State its power under *quo warranto* proceedings to interfere with a bridge as a public nuisance which impedes navigation of waters entirely within its borders, and so order such bridge modified or removed.[75] If a

71. Mississippi & Mo. R. R. Co. v. Ward, 2 Black. (U. S.) 485

72. State v. Dibble, 49 N. C. (4 Jones L.) 107.

73. Chatfield v. New Haven, 110 Fed. 788.

74. The Terre Haute Drawbridge Co. v. Halliday, 4 Ind. (4 Porter) 36.

75. Lake Shore & M. S. R. Co. v. Ohio, Humphrey, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. Ed. 747.

Authority of secretary of war concerning bridges over navigabble waterways conferred by Act September 19, 1890, c. 907, §§ 4, 5, does not take away from the States the authority to bridge such streams, but merely creates a cumulative and additional remedy to prevent such structures though lawfully authorized from interfering with commerce. "The mere delegation to the secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the secretary power to that end. When the distinction between an authorized structure so erected as to impede commerce, and an unauthorized work of the same character is borne in

town builds a bridge in such a manner as to set a stream of water back upon the land of plaintiff, causing damage to the latter, it is

mind, the fallacy of the contention relied on becomes apparent. The mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built. If the interpretation claimed were to be given to the act, its necessary effect would be that Congress, in creating an additional means to control bridges erected by authority of law, had by implication, confirmed and made valid every bridge built without sanction of law. The language of the seventh section makes clearer the error of the interpretation relied on. The provision that it shall not be lawful to thereafter erect any bridge on any navigable river or navigabble waters of the United States, under any act of the legislative assembly of any State, until the location and plan of such bridge . . . have been submitted to and approved by the secretary of war, contemplated that the function of the secretary should extend only to the form of future structures, since the act would not have provided for the future erection of bridges under State authority if its very purpose was to deny for the future all power in the States on the subject. The qualifications affixed to the proviso which accompanies this section throws light on the entire statute and points obviously to the purpose intended to be accomplished by its enactment. The qualifying language is that the section shall not apply to any bridge heretofore duly authorized by law, or be so construed as to authorize the construction of any bridge, drawbridge, bridge piers and abutments, or other works under an act of the legislature of any State, over or in any stream, port, roadstead, haven or harbor, or other navigable water, not wholly within the limits of such State. The construction claimed for the statute is that its purpose was to deprive the States of all power as to every stream, even those wholly within their borders, whilst the very words of the statute, saying that its terms should not be construed as conferring on the States power to give authority to build bridges on streams not wholly within their limits, by a negative pregnant with an affirmative, demonstrate that the object of the act was not to deprive the several States of the authority to consent to the erection of bridges over navigable waters wholly within their territory. To hold that the act manifested an intention on the part of Congress to strip the several States of all authority over every navigable stream wholly within the State would require the obliteration of these qualifying words, and would therefore be the creation of a new statute by judicial construction." Lake Shore & Michigan Railway v. Ohio, 165 U. S. 365, 368, 369.

See generally as to approval, etc., of official. Egan v. Hart, 165 U. S. 188, 41 L. Ed. 680, 17 Sup. Ct. 300; Miller v. Mayor of New York, 109 U. S. 385, 27 L. Ed. 971, 3 Sup. Ct. 228.

liable therefor, and even though there is no allegation in terms of negligence or unskillfulness in such construction, it is a matter of form not subject to general demurrer.[76] Again, the sufficiency of a bridge to carry off the water of a particular stream may be shown by the testimony of one who has knowledge of the fact from actual observation, though he is not an expert.[77] And in case an overflow of land and consequent destruction of property is caused by a railroad pile bridge across a creek the court will consider the fact that the damage was caused by an extraordinary flood. Railroad companies are only bound to build and maintain such bridges and other structures as ordinary and reasonable men can foresee shall be reasonably necessary to meet the ordinary contingencies and demands of nature.[78] In an early English case it is held that if a bridge be built in a slight or incommodious manner, no person can, at his choice, impose such a burden on the county; and it may be treated altogether as a nuisance, and indicted as such. But if the public lie by without objection, and make use of it for some time, it is evidence that they adopt the act.[79]

§ 275. **Docks, wharves, piers and like structures.**—It may be generally stated that even though a person has the title to the soil on the shore or under the water, he cannot obstruct a navigable river in such a manner as to interfere with the free use of it by the public as a highway, and this rule precludes his construction of a wharf so obstructing or interfering with such use. A person may, however, build a wharf for the accommodation of the public navigating the river and for his own private profit, not interfering with navigation. But the right to construct and use a wharf is subject to the paramount right of the public to navigate and use the river as a common highway, and it can in no way interfere with such public use and the right of the public is not confined to any particular part or portion of such stream, but extends to the

76. Mootry v. Town of Danbury, 45 Conn. 550, 29 Am. Rep. 703.

77. Willitts v. Chicago, Burlington & Kansas City R. Co., 88 Iowa, 282, 21 L. R. A. 608, 55 N. W. 313.

78. Peoria & Pekin Union Ry. Co. v. Barton, 38 Ill. App. 469.

79. King v. Inhabitants of West Riding, 2 East, 342, 348, 6 R. R. 439, per Lord Ellenborough, C. J. (a case of repair of bridge).

entire stream, just as the right to use a common highway extends to all parts thereof.[80] It is also decided that in the exercise of his property rights the owner of land abutting on navigable water may lawfully build a wharf to the channel, unless restrained by peculiar conditions of navigation or by public regulations.[81] So the

80. Sherlock v. Bainbridge, 41 Ind. 35, 13 Am. Rep. 302, case modifies 29 Ind. 364, 95 Am. Dec. 614. See §§ 65, 212 *et seq.* herein.

Qualification of rights.—The right of an individual to build a wharf in front of his land in navigable waters, is subject to the qualification, that such wharf does not improperly impede the public navigation; the object of the law conferring this right being to benefit commerce. In this case, A. and B. were owners of contiguous lots of land, bounded on the easterly side, by a harbor; A.'s lot lying south of B.'s. A. owned a wharf extending from his land into the harbor, at the further end of which was a short wharf at right angles with the principal one, the whole being in the form of a —|. This wharf, on the north side of it, where vessels principally lay, was a safe and convenient one, and much resorted to. B. was about driving a connected row of piles from the south-east corner of his land to the north-east end of A.'s wharf, in such a manner as to entirely obstruct the passage of vessels from the waters of the harbor to the north side of A.'s wharf, which would greatly impair the value of A.'s property. This obstruction was not contemplated by B. as part of a wharf which he intended to construct adjoining his land. On a bill in equity, brought by A. against B. to restrain him from making such obstruction, it was held that A. was entitled to the relief sought. Frink v. Lawrence, 20 Conn. 117, 50 Am. Dec. 274.

No distinction as to tidal or non-tidal rivers.—In an English case it is held that the rights of a riparian proprietor against adjoining or opposite riparian proprietors are not greater in respect of a tidal than in respect of a non-tidal river. In this case plaintiff and defendant were opposite riparian proprietors on the banks of a navigable tidal river, and it was held that the defendant could not for the protection of his own soil or otherwise, construct a jetty projecting into the bed of the river, whereby the tidal water was thrown with greater violence upon the plaintiff's shore, and the public navigation of the river was or might be impeded, and that a suit by information and bill to restrain the erection of such a jetty was properly constituted. It was also held that the fact of the river traffic having been almost entirely superseded by local causes did not affect the right of the public to have the navigation conserved. Atty.-Genl. v. Lonsdale, 38 L. J. Ch. 335, L. R. 7 Eq. 377, 20 L. T. 64, 17 W. R. 219.

81. New York, New Haven & Hartford Rd. Co. v. Long, 72 Conn. 11, 43 Atl. 559. In this case the plaintiff sought to restrain the defendants from extending their wharf

State may improve the navigation of all navigable rivers, and all other streams within her borders, and may authorize the erection of dams, locks, bridges, and other works,[82] provided that they do not substantially injure such streams for purposes of navigation.[83] There is, however, an irreconcilable conflict in the decisions as to wharves and piers, and this necessarily follows from the various factors involved in determining whether or not these and like structures constitute obstructions to navigation or are nuisances. Many of these questions are not within the scope of this work, and with certain exceptions have not been considered herein.[84]

parallel with and adjacent to its pier, alleging that such extension would obstruct navigation and prevent vessels from reaching that side or face of the plaintiff's wharf, to its great loss and damage. The defendants denied these allegations and averred in connection therewith, that they were owners of the upland and of a small wharf thereon, and as such riparian owners had the right to build the extension complained of. The plaintiff denied this averment. Upon the trial the court found that the existing wharf of the defendants was at the foot of a public street, and that such structure and any extension of it must remain a public wharf or landing place; and, inasmuch as the defendants threatened and intended to use the extension for their private use exclusively, granted an injunction to prevent its erection. Held, that these facts were outside the issue and could not justify the judgment rendered.

That riparian owner has right to injunction to preserve right to free communication to river channel and prevent maintenance of piers obstructing such access, see Reeves v. Backus-Brooks Co., 83 Minn. 339, 86 N. W. 337. Compare Bond v. Wool, 107 N. C. 139, 12 S. E. 281, and citations in note 84 under this section.

82. See §§ 273, 274, herein, as to navigable waters and bridges.

83. The Board of Commissioners of St. Joseph County v. Pidge, 5 Ind. 13.

Statutory authorization or grant to extend wharf into harbor channel is subject to conditions under which grant was made, and in absence of intent expressed to contrary constitutes revocable license. Bradford v. McQuestion, 182 Mass. 80, 64 N. E. 688.

Statutory right to fill in lands under water to bulkheads and pier lines of navigable waters does not exclude a riparian owner from maintaining a pier into such waters. White v. Nassau Trust Co., 168 N. Y. 149, 61 N. E. 169.

City of New York may authorize others than owners of wharves and bulkheads to construct piers in front thereof on compliance with statutory conditions. Bedlow v. New York Floating Dry Dock Co., 112 N. Y. 263, 2 L. R. A. 629, 19 N. E. 800, 20 N. Y. St. R. 707, under statute 1806.

84. As to right to build wharves, piers, etc., see Il-

"The question of the right to project wharves or piers into the waters in front of the riparian land is one of local law to be settled

linois C. R. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018, 47 Alb. L. J. 129 (may to navigable part of water); Railroad Co. v. Schurmeier, 7 Wall. (U. S.) 272 (riparian owners may construct wharves for convenience of navigation and commerce); Leverich v. City of Mobile, 110 Fed. 170 (wharves may, under policy of modern times, be constructed by riparian owners to navigable waters where they do not obstruct navigation and are for the benefit of commerce, especially where the right has been recognized by the State); Illinois, Hunt v. Illinois C. R. Co., 91 Fed. 955, 34 C. C. A. 138 (may reach practical navigability from time to time, including waters navigable for largest vessels); Case v. Loftus, 39 Fed. 730, 5 L. R. A. 684 (shore abutter on tide lands has subject to certain exceptions access to water); Turner v. City of Mobile, 135 Ala. 73, 33 So. 132 (right to wharf under statute 1887, act Feb. 28, and effect thereof); Webb v. City of Demopolis, 95 Ala. 116, 13 So. 289, 21 L. R. A. 62 (city's right to reach navigable river water line); Martin v. Heckman, 1 Alaska, 165 (wharf may be extended at right angle to shore across tide lands to deep water but not at line and angle to exclude approach from deep water to another upland owner); Sherley v. Bernicia, 118 Cal. 344, 50 Pac. 404 (purchasers from municipality of land between upland and wharf or harbor line may reclaim same and cover with wharves, etc; city may make street a public wharf and close purchaser's access except over street to deep waters); Ockerhausen v. Tyson, 71 Conn. 31, 40 Atl. 1041 (shore owner on tide water has right to land reclaimed and to erect wharves, etc., but others rights must not be infringed); Lane v. New Haven Harbor Comm'rs, 70 Conn. 685, 40 Atl. 1068 (right to wharf subject to paramount right to improve navigation); Prior v. Swartz, 62 Conn. 132, 25 Atl. 398, 18 L. R. A. 668 (land owner on navigable waters right to wharf below low water mark must so exercise as not to interfere with navigation); Mills v. Evans, 100 Iowa, 712, 69 N. W. 1043 (pier below high water line must not interfere with navigation and State regulations must be complied with); Trustees, etc., of Brookhaven v. Smith, 90 N. Y. Supp. 646, 98 App. Div. 212 (right to build wharf below high water mark did not exist under common law, as it stood in 1693; and fee owner is not warranted in so wharfing because of general public right of navigation); People v. Mould, 55 N. Y. Supp. 453, 37 App. Div. 35, rev'g 52 N. Y. Supp. 1032, 24 Misc. 287 (pier is lawful when constructed to enable riparian owner to reach navigable water, unless public necessity or public use of the land requires its removal or it impedes navigation, or it is otherwise objectionable because of its infringements of other public rights); Bond v. Wool, 107 N. C. 139, 12 S. E. 281 (wharves, piers and fishhouses may be constructed in front of land between it and navigable water of

by the States in which the waters are found. Therefore, the Federal courts have nothing to do when cases involving the question come before them but to follow the local law, unless the question is raised whether or not, by an attempted change of the local law, either by statute or by change of decision by the court, a vested right has been impaired in a manner which cannot be done under the Federal Constitution. But the Supreme Court of the United States has been in the habit of expressing its opinion upon the

sound even to extent of precluding access to wharves by adjacent proprietors); Montgomery v. Shaver (Oreg.) 66 Pac. 923, Hill's Annot. Laws, §§ 4227, 4228 (wharf cannot be extended in front of lands of another riparian owner, although statutory authority from State allows wharves to be constructed beyond low water lines); Lewis v. Portland, 40 Oreg. 244, 35 Pac. 256, 22 L. R. A. 736 (legislation on matter of wharves on navigable but non-tidal waters and legislation as to tidelands allows construction of wharves aiding navigation); Parker v. West Coast Packing Co., 17 Oreg. 510, 21 Pac. 822, 5 L. R. A. 61 (may wharf out to points or depth which will enable ships to receive or discharge cargo); Reichard v. Flinn, 28 Pitts. L. J. N. S. 159, 20 Pa. Co. Ct. 129 (may construct docks or wharves on navigable streams when public rights are not invaded); Murphy v. Bullock, 20 R. I. 35, 37 Ati. 348 (distinction made as to size of body of water and exception made as to power of State and its delegated authority in applying rule allowing construction of wharves in front of land owner on tidal waters); Groner v. Foster, 94 Va. 650, 27 S. E. 493 (right to wharf, etc., limited to State statutory, port and warden line, defining line of navigation in certain cities and waters); Eisenbach v. Hatfield, 2 Wash. 236, 12 L. R. A. 632, 26 Pac. 539 (extension of wharves by shore owner below high water mark precluded, as against State or grantee thereof, on shores of sea or its arms. Wash. Const. Art. 15, as to harbor lines, etc., construed).

Wharves; right to erect. See note 40, L. R. A. 635, under following headings: The rule in England; the rule in this country, cases recognizing the right of the riparian owner; rule where title extends to thread of stream; effect of custom; statutory right; rights as against individuals; right under grant or license; to low-water mark; prescriptive right; the Federal cases; cases denying the right; statutory restrictions; wharves beneficial; regulation of right; harbor lines; right of municipal corporation to build; right of city to regulate; right of New York city; abatement of wharf; effect of street along shore; private contracts; direction of wharf; rights of State and general government; effect of constructing in front of private property; right in wharf which has been erected; log pier; ejectment for pier.

question as one of Federal common law, and the result is that, not only are its own utterances in hopeless conflict, but the attempt to follow them has caused much needless confusion among the State decisions." [85] It is said in a case in the Supreme Court of the United States that: "While section 12 of the Act of 1890 forbids the construction or extension of piers, wharves, bulkheads, or other works, beyond the harbor lines established under the direction of the secretary of war, in navigable waters of the United States, 'except under such regulations as may be prescribed from time to time by him,' it does not follow that Congress intended in such matters to disregard altogether the wishes of the local authorities. Its general legislation so far means nothing more than that the regulations established by the secretary in respect of waters, the navigation and commerce upon which may be regulated by Congress, shall not be disregarded even by the States. Congress has not, however, indicated its purpose to wholly ignore the original power of the States to regulate the use of navigable waters entirely within their respective limits. Upon the authority then of Cummings v. City of Chicago,[86] and the cases therein cited, to which we may add Williamette Bridge Co. v. Hatch,[87] we hold that, under existing enactments, the right of private persons to erect structures in a navigable water of the United States that is entirely within the limits of a State, cannot be said to be complete and absolute without the concurrent or joint assent of both the general and State governments. Of course, the right of the government to erect public structures in a navigable water of the United States rests upon different grounds. But we will not at this time make any declaration of opinion as to the full scope of this power, or as to the extent to which Congress may go in the matter of the erection, or authorizing the erection, of docks and like structures in navigable waters that are entirely within the territorial limits of the several States. Whether Congress may, against or without the express will of a State, give affirmative authority to private parties to erect structures in such waters, it is not necessary in this case to decide. It is only necessary to say

85. 1 Farnham on Waters and Water Rights, 539. See, also, Gould on Waters (3rd ed.), §§ 167-178.

86. 188 U. S. 410, 23 Sup. Ct. 472.

87. 125 U. S. 1.

that the Act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce and thereby to supersede the original authority of the States. The effect of that act, reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a State, depend upon the concurrent or joint assent of both the national government and the State government. The secretary of war, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such an authority, obtain also the assent of the State, acting by 'its constituted agencies.'"[88] Wharves are not nuisances *per se*, but they should be properly regulated and restricted to prevent their becoming nuisances.[89] So, a wharf extending beyond the wharf line established by statute is not of itself such a public nuisance as to justify an injunction at the instance of any private citizen.[90] And where there is a threatened injury to commerce or navigation resulting or to result from the erection of a wharf in a public harbor, such wharf may be an intrusion or encroachment upon tide waters, or the soil thereunder, belonging to the State, but the encroachment would not therefore be a public nuisance nor an injury to the harbor by legal conclusion. It is not every building below the high water mark that is *ipso facto* in law a nuisance, and the question is one of fact.[91] Again, if navigation is not injured by the erection of a wharf in tide waters it is not a nuisance.[92] So where the Legislature has provided for the use of streams of the State for logging purposes and has thereby legalized the same under certain safeguards and subject to certain restrictions, if a person, acting within such legislative authority, constructs piers in a navigable stream in a manner which permits others to use the stream without unreasonable delay or hind-

88. Montgomery v. Portland, 190 U. S. Rep. 89, 105, 106, 47 L. Ed. 965, 89 Sup. Ct. 107.

89. Geiger v. Filor, 8 Fla. 325.

90. Harlan & H. Co. v. Paschall, 5 Del. Ch. 435.

91. People v. Davidson, 30 Cal. 379, 384.

92. Thornton v. Grant, 10 R. I. 477, 14 Am. Rep. 701.

rance, such piers do not constitute a nuisance; but if they are not constructed as contemplated by the statute, they are a nuisance. Bridge piers and landing places, as well as wharves and permanent piers, are frequently constructed by the riparian proprietor on the shores of navigable rivers, bays and arms of the sea, and when they are constructed in conformity with State regulations and do not extend below low water mark they are not considered nuisances unless they are an obstruction to the paramount right of navigation. The rule governing cases of this character is generally this, that all parties interested in the free use of a navigable stream are subject to conditions that may exist in each particular case. No one may arbitrarily obstruct a stream to his neighbor's detriment. Each one is entitled to the free and reasonable use of navigable streams and may place reasonable obstructions thereon which serve a beneficial, useful purpose and leave a reasonable use to others interested.[93] But the unlawful erection or extension of a wharf which obstructs navigation may be enjoined or abated as a public nuisance, on the application of the State or of an individual who suffers a special injury therefrom. If, however, the structure itself is lawful as a wharf and the injury or nuisance arises from acts of its owner, excluding the public from their right to its use, the injunction must be sought upon that ground, and not upon the ground that the wharf is an obstruction to public navigation; the two causes of action being distinct and even antagonistic in character.[94] Again, a riparian owner on an inland navigable lake has the exclusive right to build piers and wharves in front of his land in aid of navigation, and may remove as a private nuisance a pier erected there by another person without grant or license, where the proprietor of such riparian rights protects them in a lawful and

93. Small v. Harrington (Idaho, 1904), 79 Pac. 461, 469, per Stockslager, J. Rev. Stat. 1887, § 835, considered in the above case provides that: "No dam or boom must be hereafter constructed or permitted on any creek or river unless said dam or boom has connected therewith a sluiceway, lock or fixture sufficient and so arranged as to permit timber to pass around, through or over said dam or boom without unreasonable delay or hindrance," and the claimed obstruction caused by said piers was that they impeded plaintiff's use of the stream for floating down logs, but the claim was held not sustained.

94. New York, New Haven & Hartford R. Co. v. Long, 72 Conn. 10, 43 Atl. 559.

peaceable manner.[95] And that part of a wharf which projects, without legal right, beyond the line established by the State into navigable water in a harbor is a public nuisance and obstruction.[96] A breakwater also constitutes a nuisance when it is constructed at such a place in a creek as to so deflect the water in times of flood that it injures the land of a riparian owner on the opposite bank.[97] Nor may the proprietor of a dock on a navigable stream fasten a boat or other water craft to his dock and suffer the same to remain there permanently, if thereby an obstruction is created to the free and unimpeded navigation of the stream. If, by reason of his ownership of the dock, he has the right to thus occupy a portion of the stream during his pleasure, he would have the same right to extend his dock into the river the same distance, or to build any other permanent structure there, and thus appropriate to his own use, in perpetuity, a portion of a navigable river.[98]

§ 276. **Fishing and fishing nets—Pollution or obstruction of waters.**—If the public has a right of fishery in certain waters a public nuisance may be created by substances being placed or allowed to enter therein which poison and pollute the same and kill the fish.[99] So, the Legislature has the power to declare the use of nets for fishing in certain waters to be a nuisance when the public interests are injured thereby and such use may be abated by the proper officers.[100] And if water filled with sediment is discharged into a stream, polluting it, the person responsible therefor may be enjoined at the instance of another in whom the right to fish in a certain portion of the stream is vested.[101] Again, a statu-

95. McCarthy v. Murphy, 119 Wis. 159, 96 N. W. 531.

96. The Idlewild, 64 Fed. 603, 12 C. C. A. 328.

97. Nicholson v. Getchell, 96 Cal. 394, 31 Pac. 265.

98. McLean v. Matthews, 7 Ill. App. 599, 602.

99. People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. 37, 39 L. R. A. 581, 58 Am. St. Rep. 183.

100. Lawton v. Steele, 152 U. S. 133, 14 Sup. Ct. 499, 49 Alb. L. J. 301, 38 L. Ed. 385, id. 119 N. Y. 246, 23 N. E. 878, 29 N. Y. St. R. 581, 7 L. R. A. 134, 41 Alb. L. J. 348.

As to obstruction by fish nets and injunction. See Reyburn v. Sawyer, 135 N. C. 328, 65 L. R. A. 930, 47 S. E. 761.

101. Fitzgerald v. Firbank, C. A. (1897) 2 Ch. 96, 66 L. J. Ch. N. S. 529, 76 Law. T. Rep. 584.

tory common nuisance, under a statute to prohibit obstructions of fish in rivers, is indictable even though a special remedy exists under the enactment.[102] But where no right of fishery exists in the public a dam across a non-navigable stream, erected by a patentee of land on both sides thereof, does not constitute an indictable public nuisance, even though fish are thereby prevented from passing, and the same rule applies even under a statute providing for the preservation of fish.[103] And where a municipality deposits garbage in a navigable lake and through force of the wind and waves such garbage causes injury to fishing nets and kills the fish therein, but only in one instance, equitable relief will be refused as for a public nuisance.[104] The right of a riparian owner to enjoy the waters of a stream for the purpose of fishing being a substantial right, if the water thereof is polluted, it is error to instruct the jury that if they find a verdict they cannot include in the assessment of damages any amount for any fish which might have been in the stream.[105]

§ 277. Mines—Pollution of waters—Mining debris and deposits.—While an upper riparian owner may use the waters of a stream for mining purposes, and to a certain extent impair its purity, he may not so pollute it as to render it unfit for the domestic use of a lower riparian owner, or so use it as to fill up the channel and cause the debris to be deposited upon the land.[106] So, the owners of a mine will not be permitted without liability therefor to injure a lower riparian proprietor by draining into a stream matter which polutes its waters, destroys its use for domestic purposes and at times of overflow kills vegetation.[107] And one who appropriates water for domestic purposes may have a prior appropriator for mining purposes enjoined from rendering the water unfit for use by increasing the capacity of the stream from the

102. Commonwealth v. Ruggles, 10 Mass. 391.

103. People v. Platt, 17 Johns. (N. Y.) 195, 8 Am. Dec. 382.

104. Kuehn v. Milwaukee, 83 Wis. 583, 53 N. W. 912, 18 L. R. A. 553.

105. West Muncie Strawboard Co. v. Slack (Ind., 1904), 72 N. E. 879.

106. Tennessee Coal, Iron & Rd. Co. v. Hamilton, 100 Ala. 252, 46 Am. St. Rep. 48, 14 So. 167 (action on the case for damages).

107. Hunter v. Taylor Coal Co., 16 Ky. L. Rep. 190.

mining waters.[108] So, a right of action exists where the waters of a pure mountain stream of water which constituted a special inducement to plaintiff's purchase of his land are so polluted by a colliery above that fish and shrubbery of plaintiff are destroyed, his fish and ice pond spoiled, and the water rendered unfit for domestic uses, so that plaintiff is compelled to cease using the water.[109] Again, where one who owned land on a stream, used the water to wash ore taken from his land, and then allowed the water to return to the stream so polluted as to be unfit for watering stock or for domestic uses, for which it was formerly used, by a lower riparian owner, and from which there is a deposit of mud and refuse ore on the land of the lower riparian owner, impairing its fertility, he was held liable in an action for damages by the lower riparian owner, especially where the injury might have been prevented by constructing proper basins.[110] So, using the banks of an unnavigable stream and casting therein large quantities of mining debris, by hydraulic mining, to be carried by the velocity of the stream down its course and into and along a navigable river, materially impeding its navigation and causing overflows and deposits of such debris upon adjoining lands is an encroachment upon the soil of the river, and an unauthorized invasion of the rights of the public to its navigation; and when such acts not only impair navigation, but also affect the rights of an entire community or neighborhood, or any considerable number of persons to the free use and enjoyment of their property, they constitute, however long continued, a public nuisance.[111] And where mining debris is deposited in and washed down the tributaries and creeks of a river it constitutes a public nuisance and the owner of property specially injured thereby may have an action to enjoin the same; and as to a county as a property owner, the nuisance is a private nuisance where the county is not suing to protect the rights of others, but purely in its proprietary capacity as the

108. Travis Placer Min. Co. v. Mills, 94 Fed. 909, 33 C. C. A. 536.

109. Sanderson v. Pennsylvania Coal Co., 86 Pa. St. 401, 27 Am. Rep. 711.

110. Drake v. Lady Ensley Coal, Iron & R. Co., 102 Ala. 501, 24 L. R. A. 64, 14 So. 749, 48 Am. St. Rep. 77, 1 Toledo Leg. News, 35.

111. People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152

owner of certain real property.[112] So, the riparian proprietors on one side of a stream, the waters of which they and their predecessors had used for sixty years for the purpose of distillation, were held entitled to have appellants interdicted from discharging mine water into the stream where said appellants, without any prescriptive right so to do, poured into the stream a large body of water which they pumped up from their mines, which water, if it had been left to the law of gravitation, would never have reached the stream. The respondents did not complain of the increased volume of the stream, but that the foreign water was of a character and quality different from that of the natural stream, and that it prejudicially affected the water of the stream for distilling purposes.[113] But the fact that a ditch is out of order and inadequate for carrying water, prevents a reservoir, claimed to intercept the waters of a stream from constituting a present nuisance.[114] And where one person's possession and ownership of a mining claim is prior in point of time to that of another person, and no right exists in favor of the latter, by agreement, regulation or custom, to dump tailings on the former's ground, no damage can be claimed of such prior owner and possessor for obstructing and filling up the flume of the person so dumping on his land if the latter is not prevented from dumping on his own ground.[115] If a stream used for placer mining is diverted by a ditch constructed by the grantors of plaintiff, said grantors being mere licensees, equity will not restrain pollution of the stream.[116] Again, the fact that a town grants leave to a mining company to build a flume in a street does not render it liable for damages to real estate of an individual occasioned by water leaking through the flume.[117]

112. County of Yuba v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049.

Deposit of debris. See note 30 Am. St. Rep. 551-557.

113. Young v. Bankier Distillery Co. (1893), A. C. 691, 69 L. T. 838, 58 J. P. 100—(H. L. Sc.).

114. Bear River & A. Water & Mining Co. v. Boles, 24 Cal. 359.

115. Ralston v. Plowman, 1 Idaho, 595.

116. Fairplay Hydraulic Min. Co. v. Weston, 29 Colo. 125, 67 Pac. 160.

117. Town of Idaho Springs v. Woodward, 10 Colo. 104, 14 Pac. 49; Town of Idaho Springs v. Filteau, 10 Colo. 105, 14 Pac. 48.

§ 278. **Taking private property by polluting water or overflowing land—Condemnation.**—If there is a taking of private property by polluting water in which an individual has riparian rights, or by overflowing his land, compensation must be made for such taking.[118] And where no power or authority is vested in a city authorizing it to enter upon or take the land of a citizen for the purpose of digging or laying a sewer thereon, by its charter or other act of the Legislature; nor any mode prescribed for the condemnation of such property for public use; then without an express grant of such power, a municipal corporation cannot exercise it. To justify the authority claimed by the city in such case, there would have to be a necessity for the taking and the payment of just and adequate compensation before taking; and the court will interfere to prevent the laying of pipes and the discharge of filthy water upon land where the nuisance is continuing, likely to be permanent, and is reasonably certain.[119] Acts of boards of water commissioners also amount to a nuisance where the complaint alleges as a cause of action that the defendant has wrongfully dug a ditch connecting with a wier, a part of defendant's system of waterworks, over plaintiff's real estate, and that during the past three years, as often as three or four times a year, it caused plaintiff's real estate to be overflowed with water by opening the gate of the wier, and allowing large quantities of water to flow into the ditch, causing it to overflow, doing damage to plaintiff's real estate, rendering it marshy and unfit for use, and that defendant now threatened to continue such acts. And although a statute provides that no injunction shall be maintained against the board of water commissioners restraining them from the use of lands, nor any action for damage to said lands, etc., such statute does not apply to a case where the board has caused a nuisance upon land not taken by it, but only to cases where it has taken land as part of its system of works, so that until it does appear that it has been so taken, or is proposed to be so taken and the suit is turned into a

118. City of Mansfield v. Balliett, 65 Ohio St. 451, 58 L. R. A. 626, 63 N. E. 86, given in full "Appendix A," at end of chapter 14. See Nolan v. New Britain, 69 Conn. 668, 38 Atl. 703.

Right to use of water as property. See note 7 Am. Dec. 531-534.

119. Butler v. Mayor of Thomasville, 74 Ga. 570.

proceeding for condemnation, the plaintiff is entitled to the ordinary remedies against nuisances.[120] An act passed in 1872, amending the charter of the city of New Britain, provided that its common council, whenever the sewage of the city should in their opinion require it, might take and appropriate in such manner as they should deem expedient, any stream running in or through the city, the act providing for an assessment of damages to owners upon the stream, and concluding as follows: "And said damages being paid or deposited as before provided, said city may go on and complete said public improvement, and to do all acts necessary or convenient for that purpose without further liability in the premises." The common council took and converted into a sewer a stream running through the city, but did not have assessed, and did not pay, any damages to the plaintiff, through whose land, at some distance below the city, the stream ran, and was rendered noxious and offensive by its polution. It was held in a suit for damages against the city: 1. That the Legislature did not intend by the act, even if it had the power, to authorize the city to take the stream until it had paid all the damages it might thereby do to any individual. 2. That the city, not having made such payment, was liable for all damages it might have caused, as much as if the act had not been passed.[121] Again, it is held that condemnation of the right to flow sewage through a river must be made in the same manner as that of a right to lay pipes or make drains through the intermediate land lying between the city and the river; and a known resident owner of land bordering on a non-navigable river, who has not been notified of the condemnation proceedings is not bound by the award of the appraisers, but may maintain an action for damages resulting to him from the pollution of the water caused by the sewage discharged into the river and carried on and along his land.[122] An where a city can by condemnation proceedings acquire a title to use as it pleases a river which it is polluting with sewage this constitutes an important factor in granting an injunction where the injuries cannot be

120. Eisenmenger v. St. Paul Water Board, 44 Minn. 457, 47 N. W. 156.

121. Kellogg v. City of New Britain, 62 Conn. 232, 24 Atl. 996.

122. Long v. City of Emporia, 59 Kan. 46, 51 Pac. 897

redressed in a suit for damages.[123] Even a statutory power to construct sewers on condemnation of land does not justify pollution of a stream where the land is not condemned.[124]

§ 279. Liability of municipal and quasi municipal or public bodies generally—Negligence—Officers and agents.—While municipal corporations are not liable for the manner in which they exercise their discretionary powers of a public, legislative or quasi judicial nature, nevertheless where their powers become ministerial duties and there is a negligent performance thereof, there is a remedy.[125] And when a city acts in its corporate and not in its governmental capacity it is liable for negligence.[126] If a city

123. Morgan v. Danbury, 67 Conn. 484, 35 Atl. 499.

124. City of Birmingham v. Land, 137 Ala. 538, 34 S. 613.

125. Joyce on Damages (Ed. 1903), § 65, p. 35. See, also 2 Dillon on Munic. Corp. (4th ed.), § 949; Tiedeman on Munic. Corp. (Ed. 1900), § 327 *et seq.;* Parker & Worthington on Pub. Health & Safety (Ed. 1892), § 40.

126. Aschoff v. Evansville, 34 Ind. App. 25, 72 N. E. 279; Wagner v. Portland, 40 Oreg. 389, 67 Pac. 300.

Not liable when acting judicially in good faith for errors of judgment. Chicago v. Norton Milling Co., 97 Ill. App. 651, aff'd 63 N. E. 1043.

When municipality liable in general. See Platt v. Waterbury, 72 Conn. 531, 45 Atl. 154; Lynch v. Springfield, 174 Mass. 430, 54 N. E. 871; McDonald v. Duluth, 93 Minn. 206, 100 N. W. 1102; Kleopfert v. Minneapolis (Minn.), 100 N. W. 669, 90 Minn. 158, 95 N. W. 908; Gerst v. St. Louis, 185 Mo. 191, 84 S. W. 34; Wagner v. Portland, 40 Oreg. 389, 67 Pac. 300; Fox v. Philadelphia, 208 Pa. 127, 65 L. R. A. 214, 57 Atl. 356; Willoughby v. Allen, 25 R. I. 531, 56 Atl. 1109; Hathaway v. Osborne, 25 R. I. 249, 55 Atl. 700; Ostrom v. San Antonio, 94 Tex. 523, 62 S. W. 909; City of Winchester v. Carroll, 99 Va. 727, 3 Va. Sup. Ct. Rep. 555, 40 S. E. 37; Normille v. City of Ballard, 33 Wash. 369, 74 Pac. 566; Bunker v. City of Hudson (Wis.), 99 N. W. 449. Examine Chicago v. Selz, Schwab & Co., 202 Ill. 545, 67 N. E. 386, affg. 104 Ill. App. 376; Norton v. New Bedford, 166 Mass, 48, 43 N. E. 1034; Boye v. Albert Lea, 74 Minn. 230, 76 N. W. 1131; Twist v. Rochester, 165 N. Y. 619, 59 N. E. 1131, affg. 37 App. Div. 307, 55 N. Y Supp 850; Missano v. New York, 160 N. Y. 123, 54 N. E. 744, rev'g. 17 App. Div. 536, 45 N. Y. Supp. 592; Town of Southeast v. New York, 96 App. Div. 598, 89 N. Y. Supp. 630.

When municipality not liable in general, see Lampe v. San Francisco, 124 Cal. 546, 57 Pac. 461; Veraguth v. Denver, 19 Colo. App. 473, 76 Pac. 539; City of Dalton v. Wil-

acts in its governmental capacity or in the exercise of a governmental functions instead of in its private corporate capacity it is not liable for the negligent acts of its officers and agents.[127] But where the acts of such officers or agents are not performed in the exercise of any governmental function the city may be held liable for the negligent acts of such officers.[128] So, where, in the con-

son, 118 Ga. 100, 44 S. E. 830; Gray v. City of Griffin, 111 Ga. 361, 36 S. E. 792; Robertson v. City of Marion, 97 Ill. App. 332; Williams v. Indianapolis, 26 Ind. App. 628, 60 N. E. 367; Frankfort v. Commonwealth, 25 Ky. L. Rep. 311, 75 S. W. 217; Bowden v. Rockland, 96 Me. 129, 51 Atl. 815; Stowell v. Ashley, 184 Mass. 416, 68 N. E. 675; Tyler v. Revere, 183 Mass. 98, 66 N. E. 567; Butman v. Newton, 179 Mass. 1, 60 N. E. 401; Nicholson v. Detroit, 129 Mich. 246, 8 Det. Leg. N. 937, 88 N. W. 695; Dudley v. Buffalo, 73 Minn. 347, 76 N. W. 44; Thompson v. City of Macon, 106 Mo. App. 84, 80 S. W. 1; Murray v. City of Omaha, (Neb.), 92 N. W. 299; Stockwell v. Town of Rutland, 75 Vt. 76, 53 Atl. 132; McCray v. Fairmont, 46 W. Va. 442, 33 S. E. 245; Mauske v. Milwaukee (Wis.), 101 N. W. 377.

127. Colwell v. Waterbury. 74 Conn. 568, 51 Atl. 530, 57 L. R. A. 218; Chicago v. Norton Milling Co., 97 Ill. App. 651, affd. 63 N. E. 1043; Aschoff v. Evansville, 34 Ind App. 25, 72 N. E. 279; Bowden v. Kansas City, 69 Kan. 587, 66 L. R. A. 18, 77 Pac. 573; City of Lexington v. Batson, 26 Ky. L. Rep. 363, 81 S. W. 264; Twyman v. Board of Councilmen of Frankfort, 25 Ky. L. Rep. 1620, 78 S. W. 446; Planters Oil Mill v. Monroe Waterworks & L. Co., 52 La. Ann. 1243, 27 So. 684; Miller v. Minneapolis, 75 Minn. 131, 5 Am. Neg. Rep. 183, 77 N. W. 788; Ely v. St. Louis, 181 Mo. 724, 51 S. W. 168; Peterson v. Wilmington, 130 N. C. 76, 56 L. R. A. 959, 40 S. E. 853; Rose v. Toledo, 24 Ohio Civ. Ct. R. 540; Green v. Muskingum County Comm'rs, 23 Ohio Civ. Ct. R. 43; Neil v. Barron, 8 Ohio S. & C. P. Dec. 424, 7 Ohio N. P. 84; Wagner v. Portland, 40 Oreg. 389, 67 Pac. 300; Simpson v. City of Whatcom, 33 Wash. 392, 63 L. R. A. 815, 74 Pac. 577; Wood v. City of Hinton, 47 W. Va. 645, 35 S. E. 824; Bartlett v. Clarksburg, 45 W. Va. 393, 31 S. E. 918, 5 Am. Neg. Rep. 492, 43 L. R. A. 295; Parker & Worthington on Pub. Health & Safety (Ed. 1892), § 160 et seq. Examine Gordon v. City of Omaha (Neb.), 99 N. W. 242. Lefrois v. Monroe County, 162 N. Y. 563, 50 L. R. A. 206, rev'g 48 N. Y. Supp. 519, 24 App. Div. 426.

When municipal officers act judicially and not as agents of city see Kidson v. Bangor, 99 Me. 139, 58 Atl. 900.

128. City of Denver v. Porter, 126 Fed. 288. See Esburg-Gunst Cigar Co. v. Portland, 34 Oreg. 282, 55 Pac. 961, 43 L. R. A. 435.

When not performing public governmental duty city liable for agents' negligence. Howrigan v. Norwich, 77 Conn. 358, 59 Atl. 487.

struction of sewers, a distinction exists between acts performed wholly outside the corporate powers and acts performed within the corporate powers, and which might lawfully have been performed, the city will not be liable in the former case but will be liable in the latter case for injuries caused by proceeding in an irregular manner.[129] But a suit lies to enjoin a village from maintaining a sewer as a nuisance even though commissioners are vested with the entire charge and control of sewers and they can sue and be sued.[130] And if sewers are so negligently constructed as to injure private property the municipality is liable.[131] Where the acts of a town involved in the necessary performance of a duty prescribed by a municipal ordinance are strictly ministerial, and when performed by an officer or agent, by direction and for the benefit of the corporation, no exception from liability by the principal can be interposed when from negligence or unskillfulness they are so performed as to produce unnecessary damage to other parties.[132] "The authority and liability of our quasi-public corporations known as towns, as distinguished from municipal corporations incorporated under special charters, are generally only such as are defined and prescribed by general statutory provisions. Some things they may lawfully do and others they have no authority for doing. To create a liability on the part of a town not connected with its private advantage the act complained of must be within the scope of its corporate powers as defined by the statute. If the particular act relied on as the cause of action be wholly outside of the general powers conferred on towns, they can in no event be liable therefor, whether the performance of the act was expressly directed by a majority vote or was subsequently ratified. So a town is not liable for the unauthorized and illegal acts of its officers, even when acting within the scope of their duties; but it may become so when the acts complained of were illegal but done under its direct authority, previously conferred or

129. Langley v. Augusta, 118 Ga. 590, 45 S. E. 486.

130. Bolton v. New Rochelle, 84 Hun (N. Y.), 281, 32 N. Y. Supp. 442.

131. Cummings v. Toledo, 12 Ohio C. C. 650, 1 Ohio C. D. 495.

132. Danbury & Norwalk Rd. Co. v. Town of Norwalk, 37 Conn. 109, 119.

subsequently ratified."[133] Again, a county is not liable for negligence in constructing a drain across a highway where the work is done in pursuance of a legislative enactment, such county being an involuntary corporation, that is, such a corporation as is forced into existence for the discharge of such governmental duties as are imposed by law; and as all such duties must be discharged through agents or employees, it follows that the corporation being exempt from liability for doing a lawful act in a negligent manner, upon the ground of compulsory agency in behalf of the public welfare, such agents cannot be held liable where the principal is not. The rule applies even though doing said work has created a nuisance, and so long as it stands the lands of plaintiff will be subject to overflow and damage.[133a] Nor is a town liable for acts which result in creating a nuisance to the property of one of its citizens, when the acts complained of are not within the scope of its corporate powers.[134] And even though a drainage district negligently performs its duties and maintains a nuisance, it is a quasi-public corporation or agency, and not liable therefor in a private suit.[135] So, a demurrer was held to have been properly sustained where the plaintiff averred that the defendant, which was a quasi-corporation, constructed a ditch and embankment along his land; that defendant was guilty of negligence in its construction; and by reason thereof the plaintiff's land had been overflowed, and that he had sustained injury, the court holding that such corporations were not ordinarily liable for negligence and that cases respecting county bridges did not apply.[136]

§ 280. **Sewers—Generally.**—If a city injures another by running a sewer from a workhouse under its control into a run

133. Seele v. Deering, 79 Me. 346, 347, 10 Atl. 45, 1 Am. St. Rep. 314, citing Morrison v. Lawrence, 98 Mass. 219; Brown v. Vinalhaven, 65 Me. 402; Small v. Danville, 51 Me. 359; Woodcock v. Calais, 66 Me. 234.

133a. Packard v. Voltz, 94 Iowa, 277, 58 Am. St. Rep. 396, 62 N. W. 757.

134. Seele v. Deering, 79 Me. 343, 10 Atl. 45, 1 Am. St. Rep. 314.

135. Sels v. Greene, 81 Fed. 555, 88 Fed. 129.

136. Nutt v. Miles County, 61 Iowa, 754, 16 N. W. 536; Green v. Harrison County, 61 Iowa, 311, 16 N. W. 136. In both these cases the question was one only of negligence.

it is liable.[137] So, the discharge of sewage through an open wooden trough in close proximity to plaintiff's house constitutes a nuisance.[138] But if an open sewer constitutes a nuisance it is no excuse, where an injunction is sought, that private premises cannot lawfully be entered upon to abate it.[139] And where a private individual constructs a sewer, but the street in which it is constructed is conveyed to and accepted by the village trustees, and such sewer is a nuisance, it may be enjoined in a suit against the village.[140] Where, however, streets in which an open temporary sewer has been built by a city have never been accepted the court will not enjoin the maintenance of the sewer, although an action lies at law by an abutting owner of land for damages for the trespass.[141] If practical public use is made of a sewer by a city and it has assumed control thereof and it creates a nuisance by flooding a store cellar, the city is liable, irrespective of who originally constructed the sewer.[142] But where grantees of lots with an easement in sewers laid by the grantor, but over which he had no control, connected their premises with the sewers, the grantor cannot be held liable for the nuisance.[143] And a suit against a city for a sewer nuisance will not be sustained where the injury arises from its present use by private person and it only appears that the sewer was constructed years before by direction of the board of aldermen.[144] Again, where quantities of poisonous gases are emitted from perforated manholes in a sewerage system, consequent upon defective construction rather than from inherent defects in the system, and such gases constitute a nuisance in a public street contiguous to a private house, an injunction will issue.[145] And if a sewer has been

137. City of Cleveland v. Beaumont, 2 Ohio Dec. 172, 4 Ohio Dec. Reprint, 444.

138. Adams v. City of Modesto, 131 Cal. 501, 63 Pac. 1083, modifying 61 Pac. 959.

139. Densby v. Kingston, 14 N. Y. Supp. 601, 38 N. Y. St. R. 42.

140. Bolton v. New Rochelle, 84 Hun (N. Y.) 281, 32 N. Y. Supp. 442.

141. Cooper v. City of Cedar Rapids, 112 Iowa, 367, 83 N. W. 1050.

142. Chalkley v. Richmond, 88 Va. 402, 14 S. E. 339, 15 Va. L. J. 66.

143. Moore v. Langdon, 2 Macky (D. C.), 127, 47 Am. Rep. 262.

144. Barge v. City of Hickory, 130 N. C. 550, 41 S. E. 708.

145. Atlanta v. Warnock, 91 Ga. 210, 18 S. E. 135, 23 L. R. A. 301.

adjudged a nuisance its further continuance will be enjoined.[146] Stench from a sewer may also constitute a ground of liability against a municipality where the ditch into which it empties is higher than the sewer outlet.[147] But a private person is not liable for a nuisance existing at the outlet of a city sewer or drain with which he has, with the city's permission connected the sewage from his house.[148] A city has power to assess for a new sewer where the old one causes a nuisance because through sinking of land it fails to conduct sewage to the outlet.[149]

§ 281. **Sewers left in unfinished state**—Successive actions may be brought for the recurring injury causing a nuisance in discharging sewage upon private property where the sewer is left in an unfinished state at the point where the injury arises, but it also appears that such sewer is part of a plan or system which the city intended to extend beyond such point where its sewerage would be elsewhere discharged.[150] And a city cannot, without liability for so doing, abandon a sewer after it has constructed it partly over plaintiff's premises, so that it discharges sewage over and upon them, where such city has for a consideration agreed to construct the same across the premises.[151]

§ 282. **Sewers negligently constructed and operated.**—A city must not only properly construct its sewers, but must also keep them in repair and, and if they are negligent in doing either they will be liable to the party sustaining injury therefrom.[152] Even though no obligation rests upon a city to construct sewers and it is not responsible to a citizen for failure to exercise its discretion in such matter, the determination of the necessity for a sewer and its location and general plan being an exercise of a legislative func-

146. Jackson v. Rochester, 7 N. Y. St. R. 853.

147. Bloomington v. Murnin, 36 Ill. App. 647.

148. Lewis v. Alexander, 24 Can. S. C. 551.

149. McKevitt v. Hoboken, 45 N. J. L. 482.

150. Chattanooga v. Dowling, 101 Tenn. 344, 47 S. W. 700.

151. McBride v. Akron, 12 Ohio C. C. 610, 3 Ohio Dec. 607.

152. Mayor & Councilmen of Frostburg v. Duffy, 70 Md. 47, 16 Atl. 642.

tion, yet, if they are established and so negligently constructed and operated as to constitute a nuisance the city is liable for injury sustained in health and property. A municipality in pursuing a public work is not privileged to commit a nuisance and if it does it is liable to a private individual in damages or may be restrained by injunction.[153]

§ 283. **Disposal of sewage.**—A corporation may be liable in part for a nuisance where it fills up a creek used for the discharge of sewage, thereby stopping its flow and causing an overflow of sewage upon low lands of a city, even though, as against proprietors of the creek, there was no right to use it as a sewer outlet.[154] And if the public has a right to take pure and unpolluted water water from a stream and it contains the germs of disease, coming from a privy or cesspool of defendant, maintained by him on the stream or its tributory, his offense would be a public one. The wrong would be against the whole community as a community, not simply against an individual or certain individuals, however numerous. If the public have a right to receive pure water through the agency of a corporaton legally authorized to take it, he who pollutes it offends the public. If it is not shown that such coropration has the right to take such water for the public the wrong or injury through such pollution is only a private one.[155] And if a sewer leading from a hotel is so negligently constructed or so out of repair as to cast filth and foul matter of a noxious and dangerous character upon and around adjoining property causing inconvenience, sickness and discomfort, it constitutes a nuisance.[156]

153. Mayor and Aldermen of Knoxville v. Klasing (Tenn., 1903), 76 S. W. 814. In this case the city authorized and directed the deposit of garbage in the sewer near plaintiff's residence, and this created a nuisance and caused sickness and depreciation in property and the city was held liable even if the construction or providing the sewer were held to be a legal function.

154. State, State Board of Health v. Jersey City, 55 N. J. Eq. 116, 35 Atl. 835, aff'd 55 N. J. Eq. 591, 39 Atl. 1114.

Pollution of stream by municipality.—See note 84 Am. St. Rep. 908-926.

155. Commonwealth v. Yost, 197 Pa. St. 171, 174, 46 Atl. 845.

156. Adams Hotel Co. v. Cobb, 3 Ind. Ty. 50, 53 S. W. 478.

§ 284. **Disposal of sewage—Municipalities, etc.**—Where municipal, quasi-municipal and public bodies generally proceed to exercise, or do exercise their powers in constructing and maintaining great public works of a sanitary nature, such as a sewerage system, and the question of the extent of or limitations upon their powers has come before the courts, these powers and the rights of the public and of private individuals in connection therewith have occasioned much discussion. But notwithstanding certain decisions not in harmony herewith, it may be stated that even though a municipality or other body has power to construct and maintain a system of sewers, and although the work is one of great public benefit and necessity,[157] nevertheless, such public body is not justified in exercising its power in such a manner as to create by a disposal of its sewage a private nuisance without making compensation for the injury inflicted or being responsible in damages therefor or liable to equitable restraint in a proper case, nor can these public bodies exercise their powers in such a manner as to create a public nuisance for the grant presumes a lawful exercise of the power conferred and the authority to create a nuisance will not be inferred.[158] It therefore constitutes a nuisance to pollute and contaminate a stream by emptying sewage of a city therein,[159] render-

157. "The police power of the State as exercised by itself or any of its delegated or subordinate agencies includes as one of the objects of its legitimate exercise the preservation of the health of the people. Under congested municipal conditions this is especially true. The establishment of a sewerage system ample in size and perfect in its workings has been considered both essential and necessary by municipal authorities to the preservation of the public health in both ancient and modern times." 2 Abbott's Munic. Corp. (Ed. 1906), § 437.

158. **City cannot create nuisance** dangerous to life and health though plenary power exists to establish sewerage system. City of Waycross v. Hank, 113 Ga. 963, 39 S. E. 577. See, also, Butler v. Thomasville, 74 Ga. 57; Robb v. La Grange, 158 Ill. 21, 42 N. E. 77, modifying 57 Ill. App. 386; examine City of Mansfield v Balliett, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628, given in full "appendix A" at end of chapter 14. See sections throughout this chapter and chap. 6, herein, as to legalized and stautory nuisances.

Although municipality can construct sewer yet it must not in so doing create a nuisance on land of a private person. Morton v. City of Chester, 2 Del. Co. R. 454.

159. City of Birmingham v. Land, 137 Ala. 538, 34 So. 613.

ing it unwholesome, impure and unfit for use.[160] But a discharge of sewage by a city upon a person's land is not a nuisance *per se*, although one *prima facie*.[161]

§ 285. **Same subject continued.**—A grant of power carries with it authority to do those things necessary to the exercise of the power granted.[162] But a city has no right to construct a sewer so as to concentrate the offal and filth of a city, which is a nuisance to the public, and discharge it upon the premises of an individual; and it is not a defense or excuse to show that such sewer or drain was constructed of the best material, and the work performed in the most skillful manner, and the plan on the most approved model. In performing such duties a city is required to construct such improvements in such manner as to avoid injury to individual property. If a public nuisance, there being no means of making proper drainage without injury to individuals, the community for whose benefit it is constructed, through their corporate government, by condemnation or otherwise, should make compensation; the burden of a nuisance should not be imposed on one or a few citizens.[163] So a city must, where its outfalls of sewers are made into tidal waters make them in such a manner that the deposits from them will be promptly removed by the reflex of the tides, so that they will not create a nuisance, either to the public health or the right of navigation, or they must provide for their speedy removal in some other mode; and the very act of accumulating and permitting to remain large masses of filth borne down by sewers in a place where they are prejudicial to public health is *per se* conclusive proof of negligence sufficient to sustain the charge of nuisance.[164] Nor are towns justified in doing an act, lawful in itself, in such a manner as to create a nuisance any more than individuals, and if a nuisance is thus created whereby another suffers damage, towns, like individuals, are responsible.

160. Mason v. City of Mattoon, 95 Ill. App. 525.

161. Vickers v. City of Durham, 132 N. C. 880, 44 S. E. 685. See note 179 below.

162. Willson v. Boise City (Idaho, 1899), 55 Pac. 887.

163. City of Jacksonville v. Lambert, 62 Ill. 519, 521, per Walker, J. See note 179 below.

164. State v. Portland, 74 Me. 268, 272, 43 Am. Rep. 586.

And although the authority of a town to act is clear, and its duty imperative, it is nevertheless subject to this qualification, interposed for the protection of others, that their authority shall be so exercised and the duty discharged in such a manner as to occasion no wanton injury to the property or rights of other persons, natural or artificial.[165] Again, whether a certain action taken by a municipality relating to the construction and use of sewers is or is not within the lawful powers of the municipality, the use of such sewers to the direct damage of a private individual constitutes an actionable wrong.[166] And if a municipal corporation causes its sewage to be emptied into a natural watercourse, thereby creating a nuisance, inflicting special and substantial damages to a riparian proprietor, it is liable in an action for the damages thereby sustained.[167] So, while a town may construct and use drains to carry off from the premises the sewage of its public buildings, as well as the surface water from its highways, it is liable to the same extent as an individual for the direct injury which such sewage, if drained into a stream, causes to a riparian proprietor by the deposit of sewage and sediment from sewage offensive from its appearance or smell.[168] If there is a natural watercourse on the land of one person, a sewer emptying into it, constructed and maintained by another, whether a natural person or a municipal corporation, which increases the flow through the watercourse, to the injury of the land, is *prima facie* wrongful and a nuisance.[169] In a Tennessee case,[170] it is said by McAllister, J.: "Lastly, it is insisted on behalf of appellants that the location and construction of the sewer was the exercise by the county of a governmental power, and the discretion committed to it cannot be controlled by the courts, unless a clear abuse of its power be shown. It is true,

165. Mootry v. Town of Danbury, 45 Conn. 550, 558, 29 Am. Rep. 703, per Carpenter, J., quoting from Dunbury & Norwalk Rd. Co. v. Town of Norwalk, 37 Conn. 109, 119.

166. Watson v. New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345.

167. Standard Bag & Paper Co. v. Cleveland, 25 Ohio Civ. Ct. R. 380, 384.

168. Watson v. New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345.

169. O'Brien v. City of St. Paul, 18 Minn. J. 176, Gilf. 163.

170. Pierce v. Gibson County, 107 Tenn. 233, 64 S. W. 33, 55 L. R. A. 477, 89 Am. St. Rep. 946.

as argued, that the necessity of a sewer, its location and general plan, are matters which involve the exercise of discretion, and ordinarily the courts will not interfere.[171] But it is well settled that a municipality or county, in the construction of a public work, is not privileged to commit a nuisance, to the special injury of the citizens, and for such act is liable as a private individual in damages, or it may be restrained by the writ of injunction." [172] And in another case in the same State it is said that: "The authorities agree that a municipality, in pursuing a public work, is not privileged to commit a nuisance, to the special injury of the citizen, and if it does, it must, as would a private individual, respond in damages therefor." [173]

§ 286. **Same subject continued—Application of rule.**—This rule above applies: to the deposit of sewage in a river, polluting the air and water of the neighborhood and filling up a mill pond fed by such stream and the nuisance in such a case is both public and private;[174] to a discharge which so pollutes the waters of a running stream that its proper use is destroyed and the health of those living near is endangered;[175] to the discharge of sewage a short distance above the land of a person into a stream passing through his land and rendering it unfit to water stock or for harvesting ice for domestic purposes;[176] to a case where the use of water for domestic purposes is destroyed and deposits are made on land whereby its value is depreciated;[177] to the discharge of sewage into a stream which flows across a person's premises into an artificial basin, constructed for domestic use, polluting the same and depositing filthy sediment on its banks;[178] to the discharge of sew-

171. Citing Horton v. Nashville, 4 Lea, 37; Chattanooga v. Reid, 19 Pickle, 616.

172. Citing Chattanooga v. Dowling, 17 Pick. (Tenn.) 345; Atlanta v. Warnock, 91 Ga. 210, 23 L. R. A. 301.

173. Chattanooga v. Dowling, 101 Tenn. R. 345, 47 S. W. 700.

174. Morgan v. Danbury, 67 Conn. 484, 35 Atl. 499.

175. Todd v. City of York (Neb.), 92 N. W. 1040.

176. Dwight v. Hayes, 150 Ill. 273, 41 Am. St. Rep. 367, 37 N. E. 218, aff'g 49 Ill. App. 530.

177. Valparaiso v. Moffit, 12 Ind. App. 250, 39 N. E. 909. See 49 N. E. 600, 19 Ind. App. 314.

178. Chapman v. City of Rochester, 110 N. Y. 273, 18 N. E. 88, 13 Cent. Rep. 426, 1 L. R. A. 296, 6

age upon private lands;[179] to the emptying of the greater part of village sewage upon a farm, creating a nauseating stench;[180] to the pollution of a stream by discharge of sewage from an almshouse and other public buildings into reservoirs from which it spreads upon the lands of a riparian proprietor, to his injury;[181] to the discharge of sewage and water over private land, through gullies, in a volume exceeding the natural flow, thereby creating a nuisance;[182] to restrain the construction of an additional sewer which will at a certain season of the year create offensive deposits on land, and also increase the pollution of a creek and lake;[183] to restrain the construction of a sewer which will discharge its sewage into a tidal stream and so impair the value of near-by corporate property and create at certain times an offensive stench affecting the officers and employes of the corporation;[184] and to restrain such pollution of a stream, even though health is not injured thereby, where the right to the enjoyment and free use of land is diminished in part and the polluted water is offensive to the senses and injurious to health.[185] So, a natural watercourse adopted as a sewer cannot for that reason be connected with a nuisance *per se*, so that sickness and death will probably be occasioned thereby to those ripar-

Am. St Rep. 366, 18 N. Y. St. R. 133.

179. Beach v. Elmira, 58 Hun (N. Y.), 606, (Mem.) 11 N. Y. Supp. 913, 34 N. Y. St. R. 522. See, also, McBride v. Akron, 12 Ohio C. C. 610. 3 Ohio Dec. 607.

When a municipal corporation discharges or threatens to discharge sewage upon private lands from the outlet of a permanent sewer without having acquired the right, the owner is entitled to restrain the injury committed or threatened, by the judgment of a court of equity, and is not confined to a recovery of his damages in action of trespass. New York, C. & H. R. R. Co. v. Rochester, 127 N. Y. 591, 40 N. Y. St. R. 193, 28 N. E. 416, modifying 1 N. Y. Supp. 456, 17 N. Y. St. R. 305, 28 W. D. 534. See, also, cases cited in notes 161, 163, last preceding.

180. Dierks v. Addison Twp. Highway Commrs., 142 Ill. 107, 31 N. E. 496.

181. Lefrois v. Monroe County, 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206, rev'g 48 N. Y. Supp. 519, 24 App. Div. 421.

182. Cox v. Essenden (Australia), 27 Chicago Leg. News, 33.

183. Gale v. City of Rochester, 71 N. Y. Supp. 986, 35 Misc. 465.

184. Sayre v. Newark, 58 N. J. Eq. 136, 42 Atl. 1068.

185. Peterson v. Santa Rosa, 119 Cal. 387, 51 Pac. 557.

ian proprietors who use the polluted waters.[186] And even though the stream polluted by sewage has a partially subterranean course, if such course is ascertainable and defined, the owner of a farm through which the stream flows and who is damaged by the loss of the use of the water for domestic purposes and for stock can recover for such damage.[187]

§ 287. **Municipal liability—Distinction between plan and construction—Maintenance or use—Sewage.**—As to the liability of a municipality for pollution by sewage of the waters of a stream a distinction is made between pollution or injury therefrom, attributable to the plan for sewage and that occasioned by improper construction, negligence in maintenance or by unreasonable or wrongful use, recovery being precluded for pollution in the former but a liability and remedy existing in the latter case against the municipality.[188]

§ 288. **English decisions—Public bodies generally—Pollution of waters—Sewage.**—The court has power to interfere with a public body in the exercise of powers conferred by act of parliament, where the exercise is not *bona fide*. Where powers are so conferred, the court will not assume that the exercise of them will create a nuisance.[189] Where a board of works is intrusted by statute with the performance of certain public duties, their position is very different from that of a company carrying on a speculative undertaking for their own benefit, and *prima facie* it will be assumed as to the public body that they are, in carrying on any authorized work, exercising their powers in the manner best calculated to carry out the public undertaking committed to them;

186. Commonwealth v. Yost, 11 Pa. Super. Ct. 323.

187. Good v. Altoona, 162 Pa. 493, 42 Am. St. Rep. 840, 29 Atl. 741.

188. Merrifield v. City of Worcester, 110 Mass. 216, 14 Am. Rep. 592.

Distinction between planning and constructing as to judicial and ministerial capacity and as to liability generally, see Chicago v. Norton Milling Co., 97 Ill. App. 651, aff'd 63 N. E. 1043.

189. Biddulph v. St. George's Hanover Square Vestry, 3 De G. J. & S. 493, 33 L. J. Ch. 411; 9 Jur. (U. S.) 953; 8 L. T. 558; 11 W. R. 739.

but even though such public bodies have legislative authority to perform an act they cannot exceed their powers by so doing the act authorized as to create a nuisance.[190] So, in another case, a local board of health was held not justified in polluting the surface water which flowed by an open gutter into a canal, by diverting it into a sewer, and passing the sewage into it.[191] So, where sewage matter was deposited in the river Thames, the question said to be raised for the first time, as regarded a river of such a width, bulk and flow of water, was how far any system of drainage could be taken to be a public nuisance and the court said in substance that these large navigable rivers were not formerly recognized with much interest by the legislature, except for the purposes of navigation and as a means of draining the surrounding country and thus preventing inundations. And coming to the question of the existence or not of a nuisance it was said that in a large public river for all the purposes of drainage, land drainage, navigation, fishing, domestic uses, and watering cattle, there must necessarily be annoyance to the inhabitants on the banks, which was distinguishable from legal nuisance, and must be submitted to, to a certain extent. "The introduction of steamers, by churning up the water with their paddles, no doubt, caused great inconvenience to persons in wherries; but no one in such a case would be entitled to complain as of nuisance. So with respect to bathing or fishing, although persons might be inconvenienced in particular spots of the river, such inconvenience would not amount to a nuisance. The question is one of degree, and some slight degree of inconvenience in navigable waters would not justify the interference of the court. If, however, the evil becomes of sufficient magnitude a nuisance exists, whether the river is navigable or not, and the court will interfere."[192] Again, a water works company, by their special act incorporating the Water Works Clauses Act,[193]

190. Atty.-General v. Metropolitan Board of Works, 11 W. R. 820, 2 N. R. 312, 9 L. T. 139, 1 H. & M. 298.

191. Manchester-Sheffield & Lincolnshire Ry. Co. v. Worksop Board of Health, 23 Beav. 198, 5 W. Re. 279, 26 L. J. Ch. 345, 3 Jur. N. S. 304.

192. Atty.-General v. Kingston-upon-Thames Corporation, 34 L. J. Ch. 481, 13 W. R. 888, 11 Jur. N. S. 596, 12 L. T. 665.

193. 1847 (st. 10 & 11 Vict. c. 17).

were empowered to construct a reservoir in a certain locality, and to use the waters which flowed into a certain river, but the act gave the company no power of acquiring the land compulsorily, and did not provide for the reservoir being of any particular construction; it contained provisions for keeping up the supply of water in the river. Another private act of the company, passed after the construction of the reservoir, recognized it as an existing work, and gave the company certain rights against mill owners on the stream as regarded the quantity of water, but saved all other rights. The company's works fouled the river with mud, so much as to make the water unfit for the purposes of the trade of silk dying theretofore carried on at mills of the plaintiff, on the river bank. It was held that there was nothing in the acts to take away the plaintiff's right to have the water pure and in its natural state, or to deprive her of her rights of action at law for the injury sustained thereby, and therefore (the damage having been proved to be sustained) to avoid multiplicity of actions the plaintiff was held entitled to an injunction restraining the nuisance.[194] If there has been an excess of the statutory powers granted to a company, but no injury has been occasioned to any individual, and there is none which is imminent or of irreparable consequence, it is held that the attorney-general alone can obtain an injunction to restrain the exorbitance.[195]

§ 289. **Disposal of sewage—Statutory authority—When a nuisance.**—If power is expressly conferred by statute upon a public corporation, as in the matter of sewers, it carries with it by implication the powers necessary for its proper performance, and also the corresponding duties and obligations which grow out of the exercise of that power; but the right to construct an outfall of a sewer into the sea does not include a right to create a public or private nuisance; it is a right to make deposits temporarily, and not a right to injure permanently without a corresponding lia-

194. Clowes v. Staffordshire Waterworks Co., 42 L. J. Ch. 107, 21 W. R. 32, L. R. 8 ch. 125, 27 L. T. 521; Waterworks Act, 1847 (10 & 11 Vict. c. 17), § 6.

195. Ware v. Regent's Canal Co., 3 De G. & J. 212, 28 L. J. Ch. 153; 5 Jur. (U. S.) 25, 7 W. R. 67.

bility.[196] Nor is a statutory authority a defense where sewage is cast upon private lands;[197] nor for polluting a stream beyond the city limits;[198] nor without at least compensation therefor can sewage be discharged into a fresh water river under a statutory authority to construct sewers in accordance with maps;[199] nor can sewage be discharged, without liability, into a creek through an extension of a sewer system made by commissioners appointed by the legislature and adopted by a village.[200] And an unnecessary exercise of power to the injury of private property rights and the creation of a nuisance is not warranted by the general grant of power authorizing a sewer system.[201] Again, the mere grant to a city of legislative authority to build sewers for the convenience and benefit of its citizens in carrying off their refuse matter and discharging it into a neighboring stream does not necessarily make such use of the sewers a governmental act to the extent of exempting the city from all liability to lower riparian proprietors who are injured by such sewage. The discharge of the accumulated filth and sewage of a city into a stream in such quantities that it is necessarily carried to the premises of a lower proprietor, where it causes a nuisance dangerous to his health and destructive to the value of his property, may be justifiable upon the ground of public necessity, but only upon payment of compensation for the property thus taken.[202] Again, a village may be liable for discharging sewage into a creek through a sewer extension constructed under legislative sanction without regard to the question of negligence in constructing such extension.[203]

196. State v. Portland, 74 Me. 268, 272, 43 Am. Rep. 586, per Barrons, J.

197. Carmichael v. Texarkana, 94 Fed. 561.

198. Nolan v. New Britain, 69 Conn. 668, 38 Atl. 703.

199. (Grey) Simmons v. Patterson, 58 N. J. Eq. 1, 42 Atl. 749 (case distinguishes Rylands v. Fletcher, L. R. 3 H. L. 330, and disapproves Merrifield v. Worcester, 110 Mass. 216, 14 Am. Rep. 592).

200. Moody v. Saratoga Springs, 45 N. Y. Supp. 365, 17 App. Div. 207.

201. Edmundson v. Moberly, 98 Mo. 523, 11 S. W. 990.

202. Platt Bros. & Co. v. Waterbury, 72 Conn. 531 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335.

203. Moody v. Saratoga Springs, 17 App. Div. 207, 45 N. Y. Supp. 365.

§ 290. **Disposal of sewage—Statutory authority—When no nuisance.**—Notwithstanding the preceding decisions there are cases which are not in harmony therewith, or which hold the contrary doctrine. Thus it is decided that if a city has legislative authority to discharge the contents of its sewers into a river, such city is not chargeable with maintaining a public nuisance and with respect to the rights of a private riparian owner above tide water, he will not be allowed an injunction to restrain the use of the sewers, provided the city compensates him for the deprivation of his property rights, the city having incurred a large expense in installing its sewer system, in reliance upon legislative authority with long acquiescence upon the landowner's part.[204] The arguments in this case were in part this: that the title of riparian owners along such river extends only to high water mark, the state is the absolute owner of the bed of the stream. Such riparian owners having no title to the bed of the stream, are not entitled to an injunction against the city on account of the pollution of the stream. The title of riparian owners above the ebb and flow of tide extends to the middle of the stream, subject only to a servitude to the public for purposes of navigation. The pollution of the river by sewage constituted the taking of the property of such owners, which the legislature could not authorize except upon just compensation. By reason of the great injury which would fall upon a city by restraining the continuous use of its sewerage system, and the acquiescence of these riparian owners above where the tide flowed, their injury being comparatively small, it would be inequitable to grant them an injunction.[205] It will be observed that the principle of compensation for the taking of property is a factor in the above decision.[206] But the following Indiana decision goes to such a length that it may fairly be said that

204. (Grey) Simmons v. Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St. Rep. 642. See, also, Sayre v. Mayor and Common Council of Newark, 60 N. J. Eq. 361, 83 Am. St. Rep. 629, 45 Atl. 985.

205. (Grey) Simmons v. Paterson, 60 N. J. Eq. 385, 45 Atl. 995, 83 Am. St. Rep. 642.

206. See City of Mansfield v. Balliett, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628, given in full "Appendix A" at end of chapter 14, herein. See, also, § 278, herein, as to compensation.

it is not in harmony with the general rule. In this case it is held that equity will not restrain a municipality from discharging its sewage in a natural water course, where it acts in conformity with the statutes, skilfully and without negligence, though the waters are polluted to the injury of lower riparian proprietors, and where there is no other natural or reasonably possible means of drainage.[207] In a Maine case it is held that if a city has a right under a State law to extend a sewer across river flats to a point below low-water mark and it so locates a sewer no remedy exists against the city unless it is shown that such sewer is unskilfully and improperly constructed and that the individual seeking a remedy has suffered a special injury thereby. In the performance of its duty to the public in locating sewers for the drainage of a city, the city council acts judicially, and for such act the city is under no common law libability. But if the construction is improperly and unskilfully made it is a ministerial act for which the city may be liable to the party injured thereby.[208] So the ground that a nuisance will be created upon private lands is held insufficient to warrant an injunction against carrying on a sewerage system.[209]

§ 291. **Disposal of sewage—Statutory authority—English decisions.**—Public works ordered by act of parliament must be so executed as not to interfere with the private rights of individuals; and in deciding on the right of a single proprietor to an injunction to restrain such interference, the circumstance that a vast population will suffer (e. g., by remaining undrained) unless his rights are invaded, is one which the court cannot take into consideration. So where the council of the borough of Birmingham were bound by a local act of parliament, incorporating the Towns Improvement Clauses Act,[210] effectually to drain the town, it was held, that they were not justified in so carrying on their

207. City of Valparaiso v. Hagen, 153 Ind. 337, 48 L. R. A. 707, 54 N. E. 1062, 74 Am. St. Rep. 305.

208. Attwood v. Bangor, 83 Me. 582, 585, 22 Atl. 466, per Libbey, J.

209. Robb v. La Grange, 57 Ill. App. 386.

210. 10 & 11 Vict. c. 34.

operations for this purpose as to drive away fish, and prevent cattle from drinking of the water of a river at a part seven miles below the town and where it belonged to the plaintiff. It was also held that, assuming the inhabitants of Birmingham to have had before their act a right to drain their houses into the river, that circumstance would not authorize the council in discharging the sewage in such a manner as to subject the plaintiff to the inconvenience of which he now complained.[211] So a local board of health cannot exceed its powers as a public body by using and interfering with a river contrary to the statute, by carrying a sewer in the fields of a private individual without his consent, such sewer having an outlet into the river for sewage of a neighboring town; such individual having also a watering place for cattle, but not being the owner of the water run of the bed of the river, and in such case an injunction will lie to restrain such board from proceeding with their works.[212] In another case it appeared that the Leeds Improvement Amendment Act, 1848, which incorporated the clauses of the Towns Improvement Clauses Act, 1847, as to making and maintaining public sewers and the drainage of houses, "except so far as they or any of them are inconsistent with the provisions of this act, or are expressly varied or excepted by this act," and by section 6, the corporation of Leeds was authorized to construct one or more trunk or other sewer or sewers, sufficiently capacious to receive the foul and drainage water and filth of the town, and to convey the same into the river Aire:—It was held that the power to drain into the river was controlled by the London Improvement Clauses Act, sec. 24, and also by sec. 107, though that clause was not expressly incorporated in the local act, and that the corporation was not authorized by the local act to create a nuisance by draining into the river.[213] It was also held that the Towns Improvement Clauses Act did not authorize the creation of a nuisance by rendering the

211. Atty.-General v. Council of Borough of Birmingham, 4 Kay & J. 528, 6 W. R. 811.

212. Oldaker v. Hunt, 3 W. R. 297, 6 De G. M. & G. 376, 55 Eng. Ch. Rep. 294, 3 Eq. R. 671, 1 Jur. N. S. 578, affg. 19 Beav. 485.

213. Atty.-General v. Leeds Corporation, 39 L. J. Ch. 711, L. R. 5 Ch. 583, 19 W. R. 19, aff. 22 L. T. 330.

water unfit for human and animal use, in the drainage of towns into public rivers thereby directed.[214] The Lunatic Asylums Act, 1845, does not, by requiring the justices to build lunatic asylums, impliedly authorize them or their successors to allow the sewage from the asylums to create a nuisance. It was also held that it was no answer to an application for an injunction to say that the defendants were a public body acting in the discharge of public duties, imposed upon them by act of parliament, which they were unable to discharge without committing the nuisance. Nor was it any answer to say that the committee of visitors were a fluctuating body, and that the nuisance had not originated with the individuals composing the present committee.[215] When statutory powers are conferred under circumstances in which they may be exercised, with a result not causing any nuisance, and new and unforseen circumstances arise which render the exercise of them impracticable without causing one, the persons so exercising them are liable to an indictment.[216] But it is also held in another English case that where a nuisance is caused by any act which, independently of the statute would have given a cause of action to any person, a public body may be made liable in damages, or be restrained by injunction, unless they can show a justification under the powers of the statute.[217] It is also decided that in the absence of negligence a local authority is not liable, under section 19 of the Public Health Act, 1875, for a nuisance caused by the overflow of a sewer.[218] Again, a vestry sanctioned the drainage of certain houses by means of cesspools with overflow pipes connecting with main pipes, sewage passed into the main pipes and from thence into a watercourse and caused a nuisance within the district of an adjoining local board, both the vestry and local

214. Atty.-General v. Kingston-on-Thames Corporation, 13 W. R. 888, 11 Jur N. S. 596, 12 L. T. 665, 34 L. J. Ch. 481.

215. Atty.-General v. Colney Hatch Lunatic Asylums, 38 L. J. Ch. 265, L. R. 4 Ch. 146, 19 L. T. 708, 17 W. R. 240.

216. Reg. v. Bradford Navigation Co., 6 B & S. 631; 34 L. J. Q. B. 191; 11 Jur. (U. S.) 769; 13 W. R. 892.

217. Glossop v. Heston & Isleworth Local Board, 49 L. J. Ch. 89, 12 Ch. D. 102; 40 L. T. 736.

218. Stretton's Derby Brewing Co. v. Derby Corporation, 63, L. J. Ch. 135 (1894), 1 Ch., 431, 8 R. 608, 69 L. T. 791, 42 W. R. 583.

board had power to proceed with respect to this nuisance. The latter sought an injunction against the former to restrain the nuisance and it was held that it was not a proper ground for an injunction against a local board that they were not properly exercising their powers or performing their duties.[219] Where a local board have not themselves constructed sewers which are a nuisance, but only permitted them to be used by inhabitants who have acquired a prescriptive right to use them, the local board do not "cause or suffer" sewage to flow into the Thames within the meaning of section 64 of the Thames Navigation Act, 1866, and cannot be convicted of a misdemeanor under that act.[220] The authority over sewers, and the drainage powers given by Parliament to local boards, do not, it is held, authorize the committal of a nuisance by the boards in their exercise of such powers.[221]

§ 292. **Distinction between nuisances of necessity in exercise of statutory powers and those from secondary causes.**—In an English case a distinction is made between nuisances which of necessity arise in the exercise of parliamentary powers, and nuisances which do not necessarily or primarily arise, but are occasioned by secondary causes within the control of persons exercising such powers as where such nuisances are not the necessary result of the work but arise from some accidental circumstance.[222]

§ 293. **Municipality acquiring land beyond its limits for sewage system.**—A municipal corporation has power unless prohibited by its charter, to acquire land beyond its limits for the purpose of perfecting a system of drainage, or sewerage when requisite for the protection of the lives and health of its inhabitants within its corporate limits notwithstanding the general rule pre-

219. Atty.-Genl. v. Clerkenwell Vestry, 60 L. J. Ch. 788 (1891), 3 Ch. 527, 65 L. T. 312, 40 W. R. 185; Nuisances Removal Act, 1855; Metropolis Local Management Act, 1855; Public Health Act.

220. Reg. v. Staines Local Board, 60 L. T. 261, 53 J. P. 358.

221. Atty.-Gen. v. Hackney Local Board, 44 L. J. Ch. 545, L. R. 20 Eq. 626.

222. Atty.-Genl. v. Metropolitan Board of Works, 11 W. R. 820, 9 L. T. 139, 2 N. R. 312, 1 H. & M. 298.

cludes such a corporation from acquiring real estate outside its corporate limits or from lawfully performing any act beyond such limits unless expressly so authorized by law.[223] But under an Illinois decision neither a city nor a village can create a nuisance by depositing its sewage, beyond the incorporated limits, upon the property of an individual.[224] And the act of a city in appropriating a stream for sewerage, even under a statutory authorization to appropriate any stream or part of a stream running in or through a city, does not bind a non-resident through whose land the stream appropriated also runs.[225]

§ 294. **Discharging sewage beyond jurisdiction.**—It is declared in an English case that: "There is not, so far as I can find, anything in the provisions of the Acts of Parliament, under which the defendants are acting, to authorize them to commit a nuisance upon property beyond the range of their jurisdiction. They could not possibly, so far as I can see, be justified in discharging the whole of the sewage of Tunbridge Wells bodily upon land not belonging to them, and lying immediately upon the limits to which their powers extend, and if they have no right to do this, neither can they, as it seems to me, have the right to send down the sewage upon an estate which, although more distant, would be prejudicially affected by it." [226]

§ 295. **Statutory condition precedent—Sewer obstructing navigable waters.**—Although a statute confers power to erect

223. Langley v. Augusta, 118 Ga. 590, 45 S. E. 486, citing Coldwater v. Tucker, 36 Mich. 474, 24 Am. Rep. 601; Tied Mun. Corp. § 294; Ell. Rds. & Sts., § 468; 10 Am. & Eng. Ency. L. (2nd Ed.) 247; 1 Dill. Mun. Corp. § 446, p. 263 (note); 2 id. p. 1333 (note); Lester v. Mayor, 69 Miss. 887; Cummins v. Seymour, 79 Ind. 491, 41 Am. Rep. 618; Cochran v. Park Ridge, 138 Ill. 295. Noting as contra Village of South Orange v. Whittingham, 58 N. J. L. 655, 35 Atl. 407, and criticising and doubting Loyd v. Columbus, 90 Ga. 20.

224. Robb v. La Grange, 158 Ill. 21, 42 N. E. 77, modifying 57 Ill. App. 386.

225. Nolan v. New Britain, 69 Conn. 668, 38 Atl. 763.

226. Golsmid v. Tunbridge Wells Improvement Commissioners, 35 L. J. Ch. 382, L. R. 1 Ch. 349, 12 Jur. (N. S.) 308, 14 L. T. 154, 14 W. R. 562, per Turner, L. J. See Matheny v. City of Aiken, 68 S. C. 163, 47 S. E. 56.

works on the soil or bed of a navigable river yet if as a condition precedent the approval of the board of admiralty is necessary it must be obtained, and where it is not obtained and a pipe connected with a sewer is carried some distance into such waters and protected by driving piles into the bed of the river it constitutes an obstruction to free navigation and is actionable.[227] So a sewer constructed under statutory authority with an outfall into a public tide-water dock must be so constructed as not to materially obstruct or interfere with navigation, and to create a nuisance by allowing deposits to accumulate and remain there and also seriously injure the rights of wharf owners.[228]

§ 296. **Sewage—Act creating nuisance absolutely necessary to execute statutory power.**—It is held in an English case that if a public body, which has powers given it by a statute for the performance of a particular object, exercises its powers so as to injure the property of others, it is responsible for the injury, unless the act done was absolutely necessary for the performance of the object of the statute.[229]

§ 297. **Pollution of waters by sewage or otherwise—Purifying, disinfecting and deodorizing.**—Although the construction of works in order to free sewage from offensive and noxious matter and the taking of lands for such treatment is authorized by statute, nevertheless such authorization does not warrant depositing sewage in canals and tanks so that it causes sickness to the community and to the owner of adjoining premises into which penetrate offensive and noxious odors arising from such deposits.[230]

227. Browlow v. Metropolitan Board of Works, 13 C. B. N. S. 768, 31 L. J. C. P. 140, 8 Jur. N. S. 891, 10 W. R. 384, 6 L. T. 187, affg. 12 W. R. 871, 16 C. B. N. S. 546, 33 L. J. C. P. 233; 21 and 22 Vict. v. 104 c. 27.

228. Franklin Wharf Co. v. Portland, 67 Me. 46, 24 Am. Rep. 1, and note. See, also, Brayton v. City of Fall River, 113 Mass. 218, 18 Am. Rep. 470.

229. Atty.-Gen. v. Colney Hatch Lunatic Asylum, 38 L. J. Ch. 265; L. R. 4 Ch. 146; 19 L. T. 708; 17 W. R. 240.

230. Bacon v. Boston, 154 Mass. 100, 28 N. E. 9.

As stated elsewhere the discharge of sewage by a city upon the premises of a person is not a nuisance *per se* but only *prima facie*. In determining whether it constitutes such a nuisance as to afford a ground for equitable interference the court will consider the fact that such sewerage is to be discharged into a sewerage disposal plant and to be purified by the most scientifically approved methods of engineering and sanitation, that the injury is anticipated or contingent and possible only and that it is not shown that irreparable injury will result or that there is not an adequate remedy at law, nor does the fact that the method prescribed for assessing the damage caused by taking land for the construction of such plant is illegal, constitute a ground for injunction to restrain erection of the plant.[231] Again, the mere fact that a city's sewers are of permanent construction does not render permanent also the nuisance occasioned by them in poisoning the waters of a stream and so injuring stock and pasture, for in such case the city has a right at any time to abate the nuisance by proper means of filtration or otherwise, using such sanitary measures as to render the sewage inocuous.[232] " In this respect cases like the present one differ from Powers v. City of Council Bluffs,[233] for there, as was observed in Hunt v. Iowa Central Ry.,[234] 'the whole injury was regarded as having occurred at one time, and, that time having been more than five years prior to the commencement of the suit, it was held to be barred. The injury was of such a character as to be beyond the defendant's power to remedy. It would be compelled to go on to lands of others to erect barriers to prevent the damage. In this case, as is shown by the evidence, the remedy is in the defendant's own hands, by work done upon its own land. Again, it was pointed out in Bennett v. City of Marion,[235] that the injury in the Powers case was beyond the city's power to repair. 'The remedy to be applied there, if any, was the construction of a wall on plaintiff's premises, where defendant had no right to go. Here the remedy could

231. Vickers v. Durham, 132 N. C. 880, 44 S. E. 685.

232. Vogt v. City of Grinnell, 123 Iowa, 332, 98 N. W. 782.

233. 45 Iowa, 652, 24 Am. Rep. 972.

234. 86 Iowa, 15, 52 N. W. 668, 41 Am. St. Rep. 473.

235. 119 Iowa, 473, 93 N. W. 558.

be applied on defendant's own premises, and there can be no doubt of its duty to abate the nuisance.' As was said in Hollenbeck v. City of Marion,[236] 'Modern scientific research has discovered means of disinfecting and deodorizing sewage so that it is practically inocuous. . . . While the system may be said to be permanent, it does not appear that the nuisance created thereby may not at any time be abated by the defendant or by the court.'[237] It is said that the wrong considered in Powers v. City of Council Bluffs,[238] and other like cases, consisted, not in creating a nuisance where the party had no right to be, but in negligently making an improvement where the right to construct it existed, and also that the doctrine of those decisions ought not to be extended. The nuisance consists not in the construction of the sewers in an illegal manner, nor where the city had no right to place them, but in pouring the filth from them into this stream, instead of destroying it by filtration through beds of sand, and the use of a septic tank, thereby rendering the sewage inocuous. Indeed, this is precisely what the city did when threatened with a suit. A temporary excavation for filtration was made immediately, and an appropriate tank, adequate for the disposal of all the sewage, to be completed by the first of December following, contracted for; thereby demonstrating that the nuisance was not permanent. A nuisance cannot be permanent which can be abated without unreasonable expense by the party creating it.'" But it must appear, in order to prevent the award of an injunction based upon existing conditions consequent upon the discharge of sewerage into a running stream that the method of treatment claimed to render the water clear and inodorous does render it potable and fit for use.[239]

§ 298. **Same subject—English decisions.**—Under the English Local Government Act Amendment Act[240] the provision that a

236. 116 Iowa, 69, 89 N. W. 210.

237. See, also, Pettit v. Town of Grand Junction, 109 Iowa, 352, 93 N. W. 381; Costello v. Pomeroy, 120 Iowa, 213, 94 N. W. 490.

238. 45 Iowa, 652, 24 Am. Rep. 972.

239. Peterson v. Santa Rosa, 119 Cal. 387, 51 Pac. 557.

240. 1861 (24 and 25 Vict. c. 61), § 4.

local board shall not "construct or use any outfall, drain or sewer for the purpose of conveying sewage or filthy water into any natural water course or stream until such sewage or filthy or refuse matter be freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse" operates as a condition in which the legislature had given these bodies the privilege of making outfall drains into natural streams and watercourses, and the words "So as to deteriorate or affect the quality of the water," etc., means the water at the point of discharge of any outfall drain and not the water in the stream generally. Therefore, where sewage has been allowed to flow direct into a natural stream it constitutes an infringement of the statute and it is not necessary to establish a case of actual public nuisance, as the legislative enactment determined that any deterioration of the quality of the water in natural streams was a public injury, and an injunction would issue as of course, although a bill to abate a nuisance alleged to be occasioned by such pollution would be dismissed, there being no evidence of a nuisance.[241] The Rivers Pollution Prevention Act, 1876, makes it an offense to cause or knowingly permit sewage matter to flow into any stream, but provides with regard to sewage matter carried into a stream along a channel existing at the date of the act, that no one shall be deemed to have committed an offense against the act if he uses the best available means to render the sewage matter harmless. On proceedings being taken under this act in the County Court against a local board to restrain the pollution of a stream, the judge found, on the plaintiff's evidence, that the defendant, who had succeeded to an ancient system of drainage whereby sewage matter was carried into the stream, had done nothing to aggravate the nuisance, and he therefore dismissed the complaint. It was held by the Court of Appeal (affirming the decision of the divisional court), that there was evidence that the defendants had knowingly permitted sewage matter to flow into the stream, and that the matter ought to be remitted to the County Court

241. Workington Local Board v. Cockermouth Local Board, 44 L. J. Ch. 118, L. R. 18 Eq. 172, 30 L. T. 590, 22 W. R. 619.

judge to consider whether they had used the best available means to render it harmless.[242]

Again, a public body was authorized by act of parliament to construct and maintain a system of sewers and drains, and was enabled by compulsory purchase to obtain the necessary lands for the erection of works in a specified spot for the purification of the sewage, and for the conveyance of the effluent sewage water along a specified course, terminating in a specified spot; the public body was also prohibited from allowing the sewage to be discharged into a river until after it had been subjected to a process of purification prescribed by the act. It was held that so long as the public body complied with the requirements of the act, they were not liable to an action for a nuisance in discharging the effluent into the river at the authorized place.[243] In another case it appeared that by direction of a local board of health the sewage of a town had been by means of drainage conveyed to a river, which sewage, not having been completely deodorized before coming in contact with the river, had so polluted the stream passing the plaintiff's property as to kill the fish therein, and otherwise causing a nuisance; it was held that the plaintiff was entitled to an injunction to restrain the further pollution of the water passing by his property.[244] Under another decision the defendant diverted a stream as it passed through his premises, but restored it undiminished, as to the quantity of water, to its former channel before it reached the premises of the plaintiff; the defendant also employed the stream, while on his premises, in a way which rendered the water unfit for ordinary use, but he alleged that the water, by the time it reached the plaintiff's lands, was freed to the utmost possible extent from any noxious ingredients with which it had become impregnated, and it did not appear that any actual damage was sustained by the plaintiff. Under these circumstances the lord chancellor dissolved an injunction which had been granted by the vice-chancellor restraining the defendant

242. Yorkshire County Council v. Holmfirth Urban Sanitary Authority, 63 L. J. Q. B. 485 (1894), 2 Q. B. 848, 9 R. 462, 71 L. T. 217, 59 J. P. 213, C. A.

243. Lea Conservancy Board v. Hertford Corporation, 1 Cav. & E. 299, 48 J. P. 628.

244. Bidder v. Croydon Local Board, 6 L. T. 778.

from diverting and using the water.[245] The facts in another case were as follows: W. occupied bleaching works on the O. B. under a lease. The improvement commissioners of H., who had adopted the local government act and thereby were constituted, the local board of health for H. commenced a system of drainage for H. in 1862, and the sewage flowing through the C. stream into the O. B. polluted its waters so that they could not be used for bleaching purposes. In 1868 W. filed his bill, praying for an injunction to restrain the commissioners from permitting the sewage to flow into the O. B. The suit was compromised, and by an agreement, dated the first of March, 1869, the commissioners agreed to pay W. a certain sum for damages and that they would not, after the thirty-first of that month, permit the sewage of H. to flow through the drains under their control into the O. B. The commissioners adopted the irrigation system for the disposal of their sewage, which proved wholly inadequate. Sewage flowed down the C. stream into the O. B. and also the overflow from the irrigation farm. W. was obliged to take other bleaching works as the waters of the O. B. were so polluted by the drainage that he could not use them. He therefore filed his bill against the commissioners, praying for an injunction in the terms of the agreement, and for an inquiry as to damages sustained by him. Relying on the performance of the agreement, W. took a new lease of the bleaching works. It was held that W. was entitled to an injunction, and an inquiry as to damages as prayed by his bill. Defendants to pay costs.[246]

§ 299. **The Chicago drainage case—Jurisdiction of federal courts—Controversies between States—State and federal law—Power of Congress to regulate commerce—Nuisance of a character not discoverable by unassisted senses.**—A very recent case in the Supreme Court of the United States[247] covers the points indicated by the heading of this section, and is of sufficient importance to warrant its insertion here in full. The facts sufficiently

245. Elmhirst v. Spencer, 2 Mac. & G. 45.

246. Wood v. High & Low Harrowgate Imp. Co., 22 W. R. 763.

247. Missouri v. Illinois (The Chicago Drainage Canal Case), 200 U. S. part 5.

appear in the opinion which is as follows: "Holmes, J.—This is a suit brought by the State of Missouri to restrain the discharge of the sewage of Chicago through an artificial channel into the Desplaines river, in the State of Illinois. That river empties into the Illinois river, and the latter empties into the Mississippi at a point about forty-three miles above the city of St. Louis. It was alleged in the bill that the result of the threatened discharge would be to send fifteen hundred tons of poisonous filth daily into the Mississippi, to deposit great quantities of the same upon the part of the bed of the last-named river belonging to the plaintiff, and so to poison the water of that river, upon which various of the plaintiff's cities, towns and inhabitants depended, as to make it unfit for drinking, agricultural or manufacturing purposes. It was alleged that the defendant Sanitary District was acting in pursuance of a statute of the State of Illinois and as an agency of that State. The case is stated at length in 180 U. S. 208, where a demurrer to the bill was overruled. A supplemental bill alleges that since the filing of the original bill the drainage canal has been opened and put into operation and has produced and is producing all the evils which were apprehended when the injunction was first asked. The answers deny the plaintiff's case, allege that the new plan sends the water of the Illinois river into the Mississippi much purer than it was before, that many towns and cities of the plaintiff along the Missouri and Mississippi discharge their sewage into those rivers, and that if there is any trouble, the plaintiff must look nearer home for the cause. The decision upon the demurrer discussed mainly the jurisdiction of the court, and, as leave to answer was given when the demurrer was overruled, naturally there was no very precise consideration of the principles of law to be applied if the plaintiff should prove its case. That was left to the future with the general intimation that the nuisance must be made out upon determinate and satisfactory evidence, that it must not be doubtful and that the danger must be shown to be real and immediate. The nuisance set forth in the bill was one which would be of international importance—a visible change of a great river from a pure stream into a polluted and poisoned ditch. The only question presented was whether as between the States of the Union, this court was competent to

deal with a situation which, if it arose between independent sovereignties, might lead to war. Whatever differences of opinion there might be upon matters of detail, the jurisdiction and authority of this court to deal with such a case as that is now open to doubt. But the evidence now is in, the actual facts have required for their establishment the most ingenious experiments, and for their interpretation, the most subtle speculations of modern science, and therefore it becomes necessary at the present stage to consider somewhat more nicely than heretofore how the evidence is to be approached. The first question to be answered was put in the well known case of the Wheeling bridge.[248] In that case, also, there was a bill brought by a State to restrain a public nuisance, the erection of a bridge alleged to obstruct navigation, and a supplemental bill to abate it after it was erected. The question was put most explicitly by the dissenting judges but it was accepted by all as fundamental. The chief justice observed that if the bridge was a nuisance, it was an offence against the sovereignty whose laws had been violated, and he asked what sovereignty that was.[249] It could not be Virginia, because that State had purported to authorize it by statute. The chief justice found no prohibition by the United States.[250] No third source of law was suggested by any one. The majority accepted the chief justice's postulate, and found an answer in what Congress had done. It hardly was disputed that Congress could deal with the matter under its power to regulate commerce. The majority observed that although Congress had not declared in terms that a State should not obstruct the navigation of the Ohio by bridges, yet it had regulated navigation upon that river in various ways and had sanctioned the compact between Virginia and Kentucky when Kentucky was let into the Union. By that compact the use and navigation of the Ohio, so far as the territory of either State lay therein, was to be free and common to the citizens of the United States. The compact, by the sanction of Congress, had become a law of the Union. A State law which violated it was un-

248. Pennsylvania v. Wheeling & Belmont Bridge Co., 13 How. (U. S.) 518.

249. 13 How. (U. S.) 561; Daniel, J., 13 How. (U. S.) 599. See, also, Kansas v. Colorado, 185 U. S. 125.

250. 13 How. (U. S.) 580.

constitutional. Obstructing the navigation of the river was said to violate it, and it was added that more was not necessary to give a civil remedy for an injury done by the obstruction.[251] At a later stage of the case, after Congress had authorized the bridge, it was stated again in so many words that the ground of the former decision was that "the Act of the Legislature of Virginia afforded no authority or justification. It was in conflict with the Acts of Congress, which were the paramount law." In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois. The only ground on which that State's conduct can be called in question is one which must be implied from the words of the Constitution. The Constitution extends the judicial power of the United States to controversies between two or more States and between a State and citizens of another State, and gives this court original jurisdiction in cases in which a State shall be a party. Therefore, if one State raises a controversy with another, this court must determine whether there is any principal of law, and, if any, what, on which the plaintiff can recover. But the fact that this court must decide does not mean, of course, that it takes the place of a legislature. Some principles it must have power to declare. For instance, when a dispute arises about boundaries, this court must determine the line, and in doing so must be governed by rules explicitly or implicitly recognized.[253] It must follow and apply those rules, even if legislation of one or both of the States seems to stand in the way. But the words of the Constitution would be a narrow ground upon which to construct and apply to the relations between States and the same system of municipal law in all its details which would be applied between individuals. If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be the establishment of a rule which would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States sanctioned by the legislature of the United States.

251. 13 How. (U. S.) 565, 566.
252. 18 How. (U. S.) 421, 429.
253. Rhode Island v. Massachusetts, 12 Pet. (U. S.) 657, 737.

The difficulties in the way of establishing such a system of law might not be insuperable, but they would be great and new. Take the question of prescription in a case like the present. The reasons on which prescription for a public nuisance is denied or may be granted to an individual as against the sovereign power to which he is subject have no application to an independent State.[254] It would be contradicting a fundamental principle of human nature to allow no effect to the lapse of time, however long.[255] Yet the fixing of a definite time usually belongs to the legislature rather than the courts. The courts did fix a time in the rule against perpetuities, but the usual course, as in the instances of statutes of limitations, the duration of patents, the age of majority, etc., is to depend upon the lawmaking power. It is decided that a case such as is made by the bill may be ground for relief. The purpose of the foregoing observations is not to lay a foundation for departing from that decision, but simply to illustrate the great and serious caution with which it is necessary to approach the question whether a case is proved. It may be imagined that a nuisance might be created by a State upon a navigable river like the Danube, which would amount to a *casus belli* for a State lower down, unless removed. If such a nuisance were created by a State upon the Mississippi, the controversy would be resolved by the more peaceful means of a suit in this court. But it does not follow that every matter which would warrant a resort to equity by one citizen against another in the same jurisdiction equally would warrant an interference by this court with the action of a State. It hardly can be that we should be justified in declaring statutes ordaining such action void in every instance where the Circuit Court might intervene in a private suit, upon no other ground than analogy to some selected system of municipal law, and the fact that we have jurisdiction over controversies between States. The nearest analogy would be found in those cases which an easement has been declared in favor of land in one State over land in another. But there the right is recognized on the assumption of a concurrence between the two States, the one, so to speak,

254. See 1 Oppenheim, International Law, 293, §§ 242, 243.

255. Davis v. Mills, 194 U. S. 451, 457.

offering the right, the other permitting it to be accepted.[256] But when the State itself is concerned and by its legislation expressly repudiates the right set up, an entirely different question is presented. Before this court ought to intervene the case should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the court is prepared deliberately to maintain against all consderations on the other side.[257] As to the principle to be laid down the caution necessary is manifest. It is a question of the first magnitude whether the destiny of the great rivers is to be the sewers of the cities along their banks or to be protected against everything which threatens their purity. To decide the whole matter at one blow by an irrevocable fiat would be at least premature. If we are to judge by what the plaintiff itself permits, the discharge of sewage into the Mississippi by cities and towns is to be expected. We believe that the practice of discharging into the river is general along its banks, except where the levees of Louisiana have led to a different course. The argument for the plaintiff asserts it to be proper within certain limits. These are facts to be considered. Even in cases between individuals some consideration is given to the practical course of events. In the back country of England parties would not be expected to stand upon extreme right.[258] Where, as here, the plaintiff has sovereign powers and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but, as some of those discharges are above the intake of St. Louis, it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that the courts should not be curious to apportion the blame. We have studied the plaintiff's statement of the facts in detail and have perused the evidence, but it is unnecessary for the purposes of decision to do more than give the general result in a very simple way. At the outset we cannot but be struck by the consideration that if this suit had been brought fifty years

256. Manville Co. v. Wooster, 38 Mass. 89.

257. See Kansas v. Colorado, 185 U. S. 125.

258. St. Helen's Smelting Co. v. Tipping, 11 H. L. C. 642. See Boston Ferrule Co. v. Hills, 159 Mass. 147. 150.

ago it almost necessarily would have failed. There is no pretense that there is a nuisance of the simple kind that was known to the older common law. There is nothing which can be detected by the unassisted senses—no visible increase of filth, no new smell. On the contrary, it is proved that the great volume of pure water from Lake Michigan which is mixed with the sewage at the start has improved the Illinois river in these respects to a noticeable extent. Formerly it was sluggish and ill smelling. Now it is a comparatively clear stream to which edible fish have returned. Its water is drunk by the fishermen, it is said without evil results. The plaintiff's case depends upon an inference of the unseen. It draws the inference from two propositions. First, that typhoid fever has increased considerably since the change and that other explanations have been disproved, and second, that the bacillus of typhoid can and does survive the journey and reach the intake of St. Louis in the Mississippi. We assume the now prevailing scientific explanation of typhoid fever to be correct. But when we go beyond that assumption everything is involved in doubt. The data upon which an increase in the deaths from typhoid fever in St. Louis is alleged are disputed. The elimination of other causes is denied. The experts differ as to the time and distance within which a stream would purify itself. No case of an epidemic caused by infection at so remote a source is brought forward and the cases which are produced are controverted. The plaintiff obviously must be cautious upon this point, for if this suit should succeed many others would follow, and it not improbably would find itself a defendant to a bill by one or more of the States lower down upon the Mississippi. The distance which the sewage has to travel (357 miles) is not open to debate, but the time of transit to be inferred from experiments with floats is estimated at varying from eight to eighteen and a half days, with forty-eight hours more from intake to distribution, and when corrected by observations of bacteria is greatly prolonged by the defendants. The experiments of the defendants' experts lead them to the opinion that a typhoid bacillus could not survive the journey, while those on the other side maintain that it might live and keep its power for twenty-five days or more, and arrive at St. Louis. Upon the question at issue, whether the new discharge from

Chicago hurts St. Louis, there is a categorical contradiction between the experts on the two sides.

The Chicago drainage canal was opened on January 17, 1900. The deaths from typhoid fever in St. Louis, before and after that date, are stated somewhat differently in different places. We give them mainly from the plaintiff's brief: 1890, 140; 1891, 165; 1892, 441; 1893, 215; 1894, 171; 1895, 106; 1896, 106; 1897, 125; 1898, 95; 1899, 131; 1900, 154; 1901, 181; 1902, 216; 1903, 281. It is argued for the defendant that the numbers for the later years have been enlarged by carrying over cases which in earlier years would have been put into a miscellaneous column (intermittent, remittent, typho-malaria, etc., etc.), but we assume that the increase is real. Nevertheless, comparing the last four years with the earlier ones, it is obvious that the ground for a specific inference is very narrow, if we stopped at this point. The plaintiff argues that the increase must be due to Chicago, since there is nothing corresponding to it in the watersheds of the Missouri or Mississippi. On the other hand, the defendant points out that there has been no such enhanced rate of typhoid on the banks of the Illinois as would have been found if the opening of the drainage canal were the true cause.

Both sides agree that the detection of the typhoid bacillus in the water is not to be expected. But the plaintiff relies upon proof that such bacilli are discharged into the Chicago sewage in considerable quantities; that the number of bacilli in the water of the Illinois is much increased, including the *Bacillus coli communis*, which is admitted to be an index of contamination, and that the chemical analyses lead to the same inference. To prove that the typhoid bacillus could make the journey an experiment was tried with the bacillus *prodigiosus*, which seems to have been unknown, or nearly unknown, in these waters. After preliminary trials, in which these bacilli emptied into the Mississippi near the mouth of the Illinois were found near the St. Louis intake and in St. Louis in times varying from three days to a month, one hundred and seven barrels of the same, said to contain one thousand million bacilli to the cubic centimeter, were put into the drainage canal near the starting point on November 6, and on December 4 an example was found at the St. Louis intake tower. Four others

were found on the three following days, two at the tower and two at the mouth of the Illinois. As this bacillus is asserted to have about the same length of life in sunlight in living waters as the *bacillus typhosus,* although it is a little more hardy, the experiment is thought to prove one element of the plaintiff's case, although the very small number found in many samples of water is thought by the other side to indicate that practically no typhoid germs would get through. It seems to be conceded that the purification of the Illinois by the large dilution from Lake Michigan (nine parts or more in ten) would increase the danger, as it now generally is believed that the bacteria of decay, the saprophytes, which flourish in stagnant pools, destroy the pathogenic germs. Of course the addition of so much water to the Illinois also increases its speed.

On the other hand, the defendant's evidence shows a reduction in the chemical and bacterial accompaniments of pollution in a given quantity of water, which would be natural in view of the mixture of nine parts to one from Lake Michigan. It affirms that the Illinois is better or no worse at its mouth than it was before, and makes it at least uncertain how much of the present pollution is due to Chicago and how much to sources further down, not complained of in the bill. It contends that if any bacilli should get through they would be scattered and enfeebled and would do no harm. The defendant also sets against the experiment with the *bacillus prodigiosus* a no less striking experiment with typhoid germs suspended in the Illinois river in permeable sacs. According to this the duration of the life of these germs has been much exaggerated, and in that water would not be more than three or four days. It is suggested, by way of criticism, that the germs may not have been of normal strength, that the conditions were less favorable than if they had floated down in a comparatively unchanging body of water, and that the germs may have escaped, but the experiment raises at least a serious doubt. Further, it hardly is denied that there is no parallelism in detail between the increase and decrease of typhoid fever in Chicago and St. Louis. The defendant's experts maintain that the water of the Missouri is worse than that of the Illinois, while it contributes a much larger proportion to the intake. The evidence is very strong that

it is necessary for St. Louis to take preventive measures, by filtration or otherwise, against the dangers of the plaintiff's own creation or from other sources than Illinois. What will protect against one will protect against another. The presence of causes of infection from the plaintiff's action makes the case weaker in principle as well as harder to prove than one in which all came from a single source.

Some stress was laid on the proposition that Chicago is not on the natural watershed of the Mississippi, because of a rise of a few feet between the Desplaines and the Chicago rivers. We perceive no reason for a distinction on this ground. The natural features relied upon are of the smallest. And if under any circumstances they could affect the case, it is enough to say that Illinois brought Chicago into the Mississippi watershed in pursuance not only of its own statutes, but also of the Acts of Congress,[259] the validity of which is not disputed.[260] Of course these acts do not grant the right to discharge sewage, but the case stands no differently in point of law from a suit because of the discharge from Peoria into the Illinois, or from any other or all the other cities on the banks of that stream. We might go more into detail, but we believe that we have said enough to explain our point of view and our opinion of the evidence as it stands. What the future may develop of course we cannot tell. But our conclusion upon the present evidence is that the case proved falls so far below the allegations of the bill that it is not brought within the principles heretofore established in the cause. Bill dismissed without prejudice."

§ 300. **Sewage—Overtaxing capacity of sewer or stream.—Overflow.**—If a city having constructed a sewer, connects it with other sewers and drains, overtaxing its capacity, allowing insoluble materials to accumulate in it and obstruct the flow of the water, causing it to flow back upon private property, its liability for the resulting damage does not differ from that of an individual who so unreasonably manages his property as to injure

259. Acts of Congress of March 30, 1822, c. 14, 3 St. 659, and March 2, 1827, c. 51, 4 St. 234.

260. Wisconsin v. Duluth, 96 U. S. 379.

his neighbor. The fact that it is a public corporation does not relieve it from liability in performing a work not imposed upon it as a public agent but voluntarily assumed under a legislative license.[261] So, in case sewage equal in amount to the volume of the stream of water is daily turned into it, and disease has broken out it constitutes a nuisance whether the water is navigable or not, and it will be interfered with by the courts.[262]

§ 301. **Sewage—Liability of occupants or owners of houses in district.**—Where a nuisance is caused by certain houses in a certain parish or district emptying their cesspools by connecting pipes into certain main pipes which pass along the road of such district, which pipes are ultimately connected with and discharge the sewage into certain brooks which flow into plaintiff's district and thus cause a nuisance, the plaintiffs would have a remedy as against the persons actively committing it; that is, against the occupants or owners of the houses whose sewage is turned into the brooks in the manner stated.[263]

§ 302. **Sewage discharged into street.**—Maintaining issues or outlets from the privies and cesspools of a large factory into public gutters of a city whereby large quantities of dangerous matter flows into such gutters to the peril of public health constitutes a nuisance, even though such acts are prohibited by city ordinance.[264] If a nuisance is alleged to be caused by disagreeable odors along a city street arising from the flow of impure water from a brewery in the same city and such impure water flows in front of plaintiff's residence and impairs the enjoyment of his

261. Roberts v. Dover, 72 N. H. 147, 153, 55 Atl. 895. An action on the case for negligently overflowing cellar of plaintiff's store.

Non-liability of municipality for non-provision against floods in stream which it has converted to its use by emptying sewer therein; see O'Donnell v. City of Syracuse, 184 N. Y. 1 (advance sheets No. 270, March 3, 1906), revg. 102 App. Div. 80.

262. Atty.-Genl. v. Metropolitan Board of Works, 11 W. R. 820, 2 N. R. 312, 9 L. T. 139, 1 H. & M. 298.

263. Atty.-General v. Clerkenwell Vestry, 60 L. J. Ch. 788 (1891), 3 Ch. 527, 65 L. T. 312, 40 W. R. 185, per Romer, J.

264. Board of Health v. Cotton Mills, 46 La. Ann. 806, 15 So. 164.

property, and a proper case is made, the nuisance may be abated or enjoined, and damages recovered where the statute provides for an action in favor of any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance.[265] Again, the fact that the mouth of the sewer is lower than the surface of the highway is not material in determining whether such sewer terminating thereon is a nuisance,[266] and it constitutes no excuse for casting sewage into a street that there is no public sewer where other means of disposal exist.[267]

§ 303. **Pollution of waters—Manufacturing processes.**—A rule recognizing the right of a city located on the banks of a stream to discharge its sewage therein, or of a landowner in developing and utilizing the natural resources of his land to discharge water therefrom, which by its natural flowage finds its way to lower lands or into streams, does not apply to a company engaged in the manufacture of articles of commerce for its own profit, which might be operated elsewhere less injuriously to the rights of others, in bringing to its factory material from which, by artificial means, it evolves putrescent, deleterious, and other waste matter which it discharges into a stream.[268] So the discharging of refuse and polluted matter into a stream constitutes a statutory nuisance where its use for domestic purposes and for watering stock is taken away, and this is true as to deposits of such refuse matter upon plaintiff's land at high water which endangers health and renders plaintiff's home almost uninhabitable.[269] And deposits in a stream, of coloring matter used in manufacturing, may be enjoined when it renders the water unfit for culinary or domestic purposes.[270] So where a manufacturing establishment in its operations discharges large quantities of deleterious substances, thereby

265. Smith v. Fitzgerald, 24 Ind. 316.

266. Dierks v. Addison Tup. Highway Comm'rs, 142 Ill. 197, 31 N. E. 496.

267. Kirkwood v. Cairns, 44 Mo. App. 88.

268. The Weston Paper Co. v. Pope, 155 Ind. 394, 56 L. R. A. 899, 57 N. E. 719.

269. Western Paper Co. v. Cornstock (Ind.), 58 N. E. 79; Burns' Rev. Stat. 1894, §§ 290, 2169; Horner's Rev. Stat. 1897, §§ 289 2075.

270. Townsend v. Bell, 59 N. Y. Supp. 203, 42 App. Div. 409.

polluting a stream and destroying the fish, and such injurious substances intermingle with the waters and are deposited upon another's land adjoining the river and render it less available for purposes of agriculture, for stock raising and as a place of residence, such act constitutes a public nuisance.[271] And the pollution and vapors of a creek caused by offal from a distillery in which hogs are kept constitutes a nuisance.[272] So, turning the offal from a slaughter house into the waters of a creek polluting them so they are unfit for domestic use and unfit for cattle, and causing odors therefrom which are injurious to health constitutes a public nuisance for which one specially injured may maintain an action.[273] And the deposit of refuse from a creamery into the bed of a stream flowing through plaintiff's land and near his buildings, polluting the water, and giving off noxious gases affecting the use and enjoyment of plaintiff's property is a nuisance; but it may be so voluntarily abated as not to constitute a nuisance.[274] So the adulteration of river waters by gas works permitting offensive and noxious matter to enter such waters to the injury of another manufacturer constitutes a ground of action.[275] So where acids and refuse from a dynamite factory pollutes a stream and destroys its use for domestic purposes and for cattle it will be restrained.[276] And one whose business is hiring and housing pleasure boats and who owns a boat house and floating wharf is entitled to a remedy for injury sustained in his business by reason of unauthorized deposits of sawdust from mills, which interferes with the purity and flow of the river.[277] Again in an action by mill-owners, riparian proprietors, to restrain the discharge of water containing acid into a stream, where the defendant asked that damages, in lieu of an injunction, might be given, an injunction was granted.[278] If the water of a stream is in fact pol-

271. West Muncie Strawboard Co. v. Slack (Ind., 1904), 72 N. E. 879; Burns' Ann. Stat. 1901, § 2154.

272. Smith v. McConathy, 11 Mo. 517.

273. Bowen v. Wendt, 103 Cal. 236, 37 Pac. 49.

274. Perry v. Howe Co-operative Creamery Co., 125 Iowa, 415, 101 N. W. 150.

275. Carhart v. Auburn Gaslight Co., 22 Barb. (N. Y.) 297.

276. Rarick v. Smith, 17 Pa. Co. Ct. 627, 5 Pa. Dist. R. 530.

277. Booth v. Rutte (P. C.), L. R. 15 App. Cas. 188.

278. Pennington v. Brinsop Hall Coal Co., 46 L. J. Ch. 773, 5 Ch. D. 769, 37 L. T. 149, 25 W. R. 874.

luted by refuse matter from a factory it can make no difference whether such matter is directly discharged into the stream or reaches there through different courses, each forming a connecting link between the factory and the polluted stream.[279] But it is a question of fact whether or not a discharge of sewerage from a glucose factory pollutes a river.[280] It is held in a New Jersey case that notice by plaintiff that the pollution of a stream used by him for domestic purposes will be opposed, given to a bleaching company before their establishment, and opposition also by him to their incorporation on the ground of consequent injury to such use with the result that a charter provision is made prohibiting such injury, are facts of force for the interposition of a court of equity although such facts do not affect the parties' legal rights.[281] In an English case where an owner of land complained that a bleaching manufactory rendered the water which passed through his grounds impure, it was held that he must prove that he sustained some substantial damages; it was not sufficient to show that the water did not come out of the defendant's grounds in as pure a state as when it entered. And where there were two streams, one passing through the defendants' grounds to their bleaching factory, the other, after it had received the water from the factory, passed through the plaintiff's land, an injunction which restrained the defendants from using both streams was, on that ground alone, untenable.[282] In another English case, it is held that the right of mill owners to impound river water in reservoirs for the purpose of trade, preserved to them by the English rivers Pollution Prevention Act of 1876, sec. 17, carries with it the right to return the water into the river, notwithstanding vegetable matter, refuse of other mills higher up the river, with which the impounded water is charged, because putrid in the reservoir, and

279. United States Board & Paper Co. v. Moore (Ind. App., 1904), 72 N. E. 487. In this case the refuse matter was formerly directly discharged into the stream, but afterwards, by reason of an accident, it reached the river through an open ditch, a flume, a reservoir a bayou and mill race.

280. State v. Glucose Sugar Refining Co., 117 Iowa, 524, 91 N. W. 794.

281. Holsman v. Boiling Springs Bleaching Co., 14 N. J. Eq. 335.

282. Elmshirst v. Spencer, 2 Mac. & G. 45.

is in that condition returned to the river. To create an offense under sec. 2 of putting putrid, solid matter into a river the effluent discharged from the reservoir must contain matter both putrid, that is, of a nature to pollute the stream, and solid within the definition of sec. 20 and not merely solid particles in suspension.[283]

283. Joint Committee of River Ribble v. Halliwell (1899), 1 Q. B. 27, 68 L. J. Q. B. N. S. 20.

284. Mississippi Mills Co. v. Smith, 69 Miss. 299, 30 Am. Dec. 546. In this case the court said: "In support of the proposition that the plaintiffs cannot recover in this suit because the water was polluted by a manufacturing company, and that the right of the plaintiffs must therefore be determined by a different rule than would be applied if the injury had been done by one not a manufacturer, the defendant relies upon the case of Pennsylvania Coal Co. v. Sanderson, 113 Pa. St. 126, 57 Am. Rep. 445. That case had been before the Supreme Court of Pennsylvania on three previous writs of error, in each of which it had been determined that the plaintiff showed a right of recovery. 86 Pa. St. 401, 27 Am. Rep. 711, 94 Pa. St. 302, 39 Am. Rep. 785, 102 Pa. St. 370. On the fourth writ of error, and upon substantially the same facts, a contrary conclusion was reached. But the decision on the last writ of error is, not that a manufacturing company, more than any other person, may pollute the waters of a stream, without liability to others having a right to the use of the water flowing therein. On the contrary, the opinion is based upon the express declaration of the court that the character of the water had not been changed. The action was by Sanderson against the coal company for polluting the waters of Meadow Brook by discharging therein the waters from its mine. The court said: 'It will be observed that the defendants have done nothing to change the character of the water or its purity, save what results from the natural use and enjoyment of their own property. They have brought nothing on the land artificially. The water, as it poured into Meadow Brook, is the water which the mine naturally discharges. Its impurity arises from natural, not artificial, causes. The mine cannot, of course, be operated elsewhere than where the coal is naturally found, and the discharge is a necessary incident to the mining of it.' The distinction between that case and this is apparent. In that the mining company, in the ordinary use of its property, opened up a flood of water which, in its natural state, flowed into the brook, and, being naturally injurious, polluted the brook. In this case the defendant company, using water in which it had a limited right, and to which the plaintiffs, after a reasonable use thereof by the defendant, had an equal right, by artificial means changed the very nature and character of the water, and instead of permitting it to flow to the plaintiffs in beneficial condition, poured it upon them, according to their witnesses, poisoned and pu-

A distinction is also made in a Mississippi case between pollution of a stream by a manufacturing company, that is by artificial means, and one where the impurity arises from natural causes, holding that such a company has no more right than any other person to pollute by artificial means such waters.[284]

trescent. For this a right of recovery manifestly existed, unless the defendant had acquired the right by prescription so to do. The verdict of the jury settles that claim against it." Mississippi Mills Company v. Smith, 69 Miss. 299, 30 Am. St. Rep. 546, 549, 550.

CHAPTER XIV.

WATERS—CONTINUED.

SECTION 304. Polluting water supply of city.
305. Ponds, pools, stagnant waters.
306. Drains, ditches, channels, canals, etc.,—Diversion of water.—Pollution.—Damages.
307. Same subject continued.
308. Legislature may act through own agencies.—Creation of sewerage district.—Independent source of pollution.—When nuisance does and does not exist.
309. Expert or scientific evidence as to pollution and effect thereof.
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311. Pollution of waters.—General decisions.
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324. Increasing height of dam.—Whether flash-boards part of dam.
325. Construction of dam by municipality.
326. Dams.—Navigable waters.
327. Restoration of dams.—Parol license.
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§ 304. **Polluting water supply of city.**—Where a city is fully empowered to purchase land along or over which a stream flows, and is fully authorized to erect a dam and make a lake to feed by means of an artificial conduit or tunnel, a city reservoir to supply

its inhabitants with pure water for drinking and other necessary purposes, such city is a riparian proprietor in the strictest sense in respect to the property purchased and held by it on the stream in question including the riparian rights of which the party under whom it claims was possessed at the time of purchase, unless derogated by grant or by user ripened into prescription. Among these rights is included that of having the stream flow into and through the lake or reservoir in its ordinary purity and quantity, without any unnecessary or unreasonable diminution or pollution of the same by the proprietors above. Therefore, where upper riparian proprietors, being entitled to the ordinary use of water, including the right to apply it in a reasonable way to purposes of trade and manufacture, use the water of the stream in an unreasonable manner, and defile the same in such a manner and to such an extent as to operate an actual invasion of the rights of such city, the latter is clearly entitled to redress by action at law, and, in case the nuisance be continued, to summary relief by injunction.[1] So pigstys, slaughterhouses, stables, privies, barnyards, drains or other objectionable places which are so situated as to pollute a city's water supply are nuisances which may be

1. Mayor & City Council of Baltimore v. Warren Mfg. Co., 59 Md. 96, 107, 108. The court, per Alvey, J., in support of the above propositions and as clearly settling them, cites Swindon Waterworks Co. v. Wilts & Berks Canal Co., L. R. 7 H. L. 697, 45 L. J. Ch. 638, 24 W. R. 284, 33 L. T. 513 (which holds that as to a corporation acquiring riparian lands under parliamentary powers all subsisting riparian rights, ordinary and prescriptive, attach, including those necessary for corporate purposes); Clowes v. Staffordshire Potteries Waterworks Co., L. R. 8 Ch. App. 125, 42 L. J. Ch. 107, 27 L. T. 521, 21 W. R. 32 (where there was nothing in the statute of a waterworks company which gave it the right to foul the river and make it impure and unfit for use for the silk dyeing trade); Pennington v. Brinsop Hall Coal Co., 5 Ch. Div. 769, 46 L. J. Ch. 773, 25 W. R. 874, 37 L. T. 149 (a case of injunction to restrain discharge of water containing acid into a stream, also a question of prescriptive right and of damages); Goldsmid v. Tunbridge Wells Imp. Comm., L. R. 1 Ch. App. 349, 14 L. T. 154, 35 L. J. Ch. 382, 14 W. R. 562, 12 Jur. N. S. 308 (a case of prescriptive right, pollution of stream and injunction); Baxendale v. McMurray, L. R. 2 Ch. App. 790, 16 W. R. 32 (a case of an ancient paper mill and pollution of stream); Sanderson v. Penn. Coal Co., 86 Pa. St. 401; Chipman v. Palmer, 77 N. Y. 51; Woodyear v. Shafer, 57 Md. 1.

abated or be otherwise relieved against,[2] and the water supply may be so far polluted at the point, where the cause of the pollution comes into the stream as to warrant an injunction at the instance of a State board of health, even though there is no pollution at the point where the city water supply is obtained.[3] Where, however, the court found that the acts of defendant in conducting its dairy business as it was conducted resulted in a pollution of the waters of a creek at the point where the dairy was situated; and further found that if the acts of defendant were continued then the drainage "may pollute the waters" of a certain reservoir, such findings do not bring the acts within the definition of a nuisance.[4] And a mere tendency to pollute the waters of a lake caused by the use of it for bathing purposes by a riparian owner is not a nuisance, though such lake is a source of water supply.[5] A legislative enactment is constitutional which limits the distance from a water supply within which a sewer may be emptied into a stream.[6] And it constitutes an exercise of one of the ordinary functions of the police power of a State to abate such a nuisance as pollution of the source of a city's water supply.[7] And where exclusive jurisdiction is not conferred on a State board of health as to supervision over the sources of a water supply a town board of health acting under statutory power may abate a nuisance which pollutes such sources of water supply.[8]

§ 305. **Ponds, pools, stagnant waters.**—A pond is not a nuisance *per se*.[9] But if it should appear that a mill-pond within a

2. City of Durango v. Chapman, 27 Colo. 169, 60 Pac. 635 (under city ordinance); Kelley v. New York, 6 Misc. 516, 27 N. Y. Supp. 164, 56 N. Y. St. R. 845, aff'd 89 Hun, 246, 35 N. Y. Supp. 1109.

3. Board of Health v. Diamond Mills Paper Co., 63 N. J. Eq. 111, 51 Atl. 1019, aff'd 64 N. J. 793, 53 Atl. 1125, under Act 1899, P. L. p. 73.

4. Spring Valley Waterworks v. Fifield, 136 Cal. 14, 68 Pac. 108.

5. People v. Hulbert, 131 Mich. 156, 91 N. W. 211, 9 Det. Leg. N. 257.

6. Topeka Water Supply Co. v. Potwin Place, 43 Kan. 404, 23 Pac. 578. See Stone v. Heath, 179 Mass. 555, 60 N. E. 975.

7. Kelly v. New York, 27 N. Y. Supp. 164, 56 N. Y. St. R. 845, 6 Misc. 516, aff'd 89 Hun, 246, 35 N. Y. Supp. 1109.

8. Stone v. Heath, 179 Mass. 555, 60 N. E. 975. See chap. 15, herein, as to powers of boards of health.

town is prejudicial to or endangers the health of the town or any part thereof, it ought to be declared a nuisance and abated. If it does not prejudice or endanger the health of the town, but the sickness there is produced by other causes, it should not be disturbed.[10] And if drainage of a part of the filth of a town into an excavation or pond is such as to cause such pond to be dangerous to health and the source of disease a nuisance may exist even though the pond be of too recent origin to have, at the time of suit, affected the health of the neighborhood.[11] So, it is sufficient to constitute a public indictable nuisance that the enjoyment of life and property in the community is rendered uncomfortable by smells and stenches produced by a pond, even though actual sickness is not caused.[12] And the depositing of the sewage of a village into a pond may cause such a pollution of the waters as to entitle the owner to a perpetual injunction.[13] Nor can a person make a nuisance of a pond which is on another's land, even though he has a right to use such pond.[14] If a corporation has the charter right to draw water from a pond at a certain height and it is lowered by wells sunk on land to intercept water, and slime and offensive vegetation is thereby left on the shore to the detriment of public health an information lies to restrain sinking such wells.[15] But an allegation that defendant caused "an unhealthy pond of standing water" is not sufficient to authorize the introduction of testimony showing injury sustained by plaintiff in consequence of sickness caused by the pond.[16] So, where the nuisance, caused by offensive matter being cast into a pond whereby the water becomes foul and poisonous, is one which can be removed

9. Holke v. Herman, 87 Mo. App. 125.

10. The Mayor, etc., of Montezuma v. Minor, 73 Ga. 484.

11. West v. State, 71 Ark. 144, 71 S. W. 483.

12. State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737.

13. Schriver v. Johnstown, 24 N. Y. Supp. 1083, 71 Hun, 232, 54 N. Y. St. R. 573, aff'd 148 N. Y. 758, 43 N. E. 980.

14. Leonard v. Spencer, 34 Hun, 341, aff'd 108 N. Y. 338, 15 N. E. 397, 13 N. Y. St. R. 653, 28 W. D. 368.

15. Attorney-General v. Jamaica Pond Acqueduct Co., 133 Mass. 361.

16. Morris v. McCarney, 9 Ga. 160.

As to sufficiency of allegation see Carland v. Aurin, 103 Tenn. 555, 53 S. W. 940.

the alleged nuisance does not constitute a permanent injury for which a recovery can be had.[17] But the fact that a stagnant pool created by a railroad company could have been drained by the city will not relieve such company from liability for special damages occasioned thereby.[18] In a Pennsylvania case a canal, part of the public works as it had been constructed by the commonwealth, was purchased by a canal company and water escaped and formed pools on adjoining lands of others, which pools became stagnant and the canal company was held liable to indictment for maintenance of a nuisance.[19] And the fact that lands are vacant and the admeasurement of damages is made difficult does not preclude recovery for damage sustained by stagnant, offensive water remaining in pits on adjoining lands.[20] So one who suffers special damage from stagnant pools of water may recover therefor, even though such pools may be a public nuisance, but whether such special damage has been occasioned is a question of fact.[21] Again, a corporation acting under statutory authority and in conformity therewith may by resolution, in the nature of an ordinance, require any lot of land within the city limits, in which the water becomes stagnant, to be filled up and drained; and where it is insisted that the city had no power to pass such a resolution because the occasion for the exercise of the power granted had not arisen, and that the excavation was not in fact a nuisance the question should be brought properly before the Supreme Court.[22]

§ 306. **Drains, ditches, channels, canals, etc.—Diversion of water—Pollution—Damages.**—In the absence of a license or grant, the owner of land has no right to divert a stream of water

17. Cleveland, C. C. & St. L. Ry. Co. v. King, 23 Ind. App. 573, 55 N. E. 875.

18. Savannah, F. & W. R. Co. v. Parish, 117 Ga. 893, 45 S. E. 280.

19. Delaware Div. Can. Co. v. Commonwealth, 60 Pa. St. 367, 100 Am. Dec. 570.

20. Busch v. New York, L. & W. R. Co., 12 N. Y. Supp. 85, 34 N. Y. St. R. 7.

21. Savannah, F. & W. Ry. Co. v. Parish, 117 Ga. 893, 45 S. E. 280.

22. City of Independence v. Purdy, 46 Iowa, 202. Examine Bush v. Dubuque, 69 Iowa, 233; Lasbury v. McCague, 56 Neb. 220, 76 N. W. 862; Rochester v. Simpson, 10 N. Y. Supp. 499, 57 Hun, 36, 32 N. Y. St. R. 732; Tuft v. Goff, 15 R. I. 299, 3 Atl. 591.

flowing through his land from its natural course, so as to discharge it upon the land or into the ditches of a lower land owner to his damage; and where it appears with reasonable probability that a defendant is about so to do, it is error in the court below to vacate an injunction restraining him therefrom until the hearing of the cause.[23] And one has no right to cast, by means of an artificial channel, drainage or other waters upon another's land, and if he does so, such act constitutes a nuisance.[24] If a prescriptive right exists to maintain or to have maintained for the benefit of a person a close underground drain across another's land, the former may continue to use it to any extent which will not affect the latter more injuriously than when used before that as a close and covered drain. In such case it would make no difference to the latter whether the amount of pollution passing through and under his land be more or less. But if the latter uncovers his drains in order to locate privies upon it and thereby creates a nuisance in the neighborhood he becomes responsible. If, however, such prescriptive right to maintain a close drain over another's land does not exist, but only a drain subject to openings fit for private uses of the latter, then the former would be entitled to no use of the drain which would inflict a greater annoyance or injury than was imposed by such prescriptive easement as existed before the diversion.[25] In an English case, the plaintiff and the

23. Porter v. Dunham & Brown, 74 N. C. 767.

24. Paddock v. Somes, 102 Mo. 226, 14 S. W. 746, 10 L. R. A. 254.

25. Masonic Association v. Harris, 79 Me. 250, 9 Atl. 737, citing Gould on Waters, §§ 344-346.

The syllabus to this case reads as follows: "The city of Belfast has, for a long period, maintained an underground or covered drain, running through an ancient brook which, in its natural state, carried a considerable volume of water through the city to the sea. For many years the drain has served to carry off waste water and foulings from the houses and stores situated in its vicinity. The complainant and respondent have adjoining premises through which the drain runs. Lately the city diverted the drain at a point above complainant's premises, carrying it around the premises of both parties, and uniting the new link with the old drain below respondent's land. Thereupon respondent threatened to stop up the old drain on his own land, thereby preventing the complainant using it, alleging that its occupation is wrongful and injurious to him, the complainant denying it. And the complainant claims not only the right to have the

defendant were respectively occupiers of adjoining houses. An old drain which commenced on the defendant's premises, and thence passed under and received the drainage of several other houses, turned back under the defendant's house, and thence under the cellar of the plaintiff's hause, and ultimately into a public sewer. The part of the return drain which passed through the defendant's premises being decayed, the sewage escaped, and flowing into the plaintiff's cellar did damage. The defendant was unaware of the existence of this return drain, and consequently of its want of repair; and it was held that defendant was liable for the damage done to the plaintiff; for that defendant's duty was to keep the sewage which he himself was bound to receive from passing from his own premises to the plaintiff's premises otherwise than along the old accustomed channel, and that that duty was independent of negligence on his part, and independent of his knowledge or ignorance of the existence of the drain.[26] It is held in a Connecticut case that where a person constructs a channel for a brook within his own boundaries he can make such channel as he pleases, irrespective of the fact whether it is covered or not, or whether it is an old channel or an entirely new one, or of one kind or another, provided no other person is injured by reason of it, and also provided that it will carry safely and without injury to others the waters of the brook that is not merely its ordinary flow, but its flow in heavy rains or its increase in volume from any ordinary natural cause. But if the channel is insufficient for such

benefit of the natural brook for its waste, but also the right to a greater enjoyment of it, acquired by the public by user. It was held that the complainant is not answerable for any consequences of the diversion caused by the city. But their privileges may be curtailed thereby, as next stated. Held, also, that the respondent should not have any increased burdens or inconveniences put upon his premises by the change, and that his burdens should not be augmented, to his injury, by the act of the city, or of the complainant, or of both combined. The respondent is not to be a loser, if not a gainer, thereby. Held, further, that if the complainant, by this rule, suffers from the act of the city in making the diversion, the city will be answerable to it for any damages sustained, unless the complainant assented to the change, and the evidence is that it did assent to it." Masonic Association v. Harris, 79 Me. 250, 9 Atl. 737.

26. Humphreys v. Cousins, 46 L. J. C. P. 432, 2 C. P. D. 239, 36 L. T. 180, 25 W. R. 371.

and causes an overflow upon another's lands its original insufficiency and subsequent maintenance would, unless other facts of the case operate to change the rule, constitute a nuisance and render the person so constructing such channel liable in damages. If a city, after construction of such channel, uses it as an outlet for sewage and surface water which would have gone in other directions, the person constructing the channel would not be liable for any damage not caused by the natural flow of the water, including that occasioned by natural causes, and the fact that the overflow from natural causes is difficult of ascertainment, will not render such person liable beyond this. In estimating the relative amount of damage "it may be very difficult for a jury to determine just how much damage the defendant is liable for and how much should be left for the city to answer for; but this is no more difficult of ascertainment than many questions which juries are called upon to decide. They must use their best judgment, and make their result, if not an absolutely accurate one, an approximation to accuracy. And this is the best that human tribunals can do in many cases. If the plaintiff is entitled to damages and the defendant liable for them, the one is not to be denied all damages, nor the other loaded with damages to which he is legally liable, simply because the exact ascertainment of the proper amount is a matter of practical difficulty."[27] Again, it is a nuisance to cut a ditch after removing an embankment in such a manner as to let water pass through another and different channel upon a person's land which theretofore had been dry and so occasion an injury and damage to him.[28] So, a ditch may be private nuisance where it is so negligently constructed, even though a right of way exists over another's land to construct the same, that it pollutes his well and cellar and leaves stagnant water on the land, causing the loss of crops and an injury to health.[29] And if by the maintenance of a ditch, which others have constructed, a person diverts surface waters so that they are cast upon another's land, he is liable for a nuisance.[30] If, however,

27. Sellick v. Hall, 47 Conn. 260.

28. George v. Wabash W. R. Co., 40 Mo. App. 433.

29. Bungenstock v. Nishuahatua Drainage Dist., 163 Mo. 198, 64 S. W. 149.

30. Town of Cloversdale v. Smith, 128 Cal. 230, 60 Pac. 851.

a statute which confers upon municipalities and like bodies the power to change the channel of watercourses running through them and to construct drains and ditches it implies, unless the exercise of such right is oppressive, a nuisance, and an interference with navigation, a power to alter a navigable river's point of discharge.[31] In an Idaho case the waters of a natural stream flowed through the city, crossing ten streets therein, and during high water flooded the streets, injuring them, to the damage of the city. To avoid such injury, the city constructed an artificial canal and diverted the waters of said stream therein. The canal was not of size sufficient to convey the waters of said stream, and overflowed, and injured plaintiff's lands. It was held, that the city was liable to plaintiff in damages, it being beneficially interested in the change of the course of a natural stream, and negligent in not constructing the canal of size sufficient to carry the water of said stream at all times, and in quantities that might be reasonably anticipated.[32] Again, where a canal company was empowered by an act to take the water of certain brooks and use it for the purposes of their canal; the water in one of the brooks at the time the act passed was pure, but it afterwards became polluted by drains before it reached the canal, and it was then penned back in the canal and became a public nuisance; it was held that the company was liable to be indicted for the nuisance, as there was nothing in the act compelling them to take the water, or authorizing them to use it so as to create a nuisance.[33]

§ 307. **Same subject continued.**—In a Maine decision the court says: "It is quite evident that a town, independent of any statutory authority, has no corporate power to dig ditches across another's land. Such an act is *ultra vires;* and any express majority vote based on a proper article in a warrant calling a meeting of the defendants directing such acts, would create no liability on

31. Canal Comm'rs v. East Peoria, 179 Ill. 214, 53 N. E. 633, aff'g 75 Ill. App. 450.

Municipal regulation of drains as a nuisance. See note, 38 L. R. A. 319.

32. Willson v. Boise City, 6 Idaho. 391, 55 Pac. 887.

33. Reg v. Bradford Navigation Co., 6 B. & S. 631, 34 L. J. Q. B. 191, 11 Jur. (U. S.) 769, 13 W. R. 892.

the part of the town.[34] But if a municipal corporation introduce, within its boundaries, water for manufacturing purposes, and by turning said water into its drains increases the water flowing into adjoining lands to the damage of the same, an action will lie for the damages against the corporation, and this is true, even if the increased water thus cast upon the adjoining lands is emptied thereon to prevent the said canal from overflowing its banks, or by reason of the actual overflow of said banks, provided the adjoining lands would not have been overflowed without said canal.[35] An artificial stream, such as a canal, is entitled to protection from pollution.[36] So, where the plaintiff, by permission of a canal company, made a communication from the canal to his own premises by which water got to those premises, with which water he fed the boilers of his engine, the defendant, without right or permission from the company, fouled the water in the canal, whereby the water as it came into plaintiff's premises was fouled, and by the use of it plaintiff's boilers were injured, it was held that plaintiff might maintain an action against defendant for thus fouling the water.[37] So the discharge of impure and foul water into a canal where its waters are used for irrigation or other useful purposes creates a nuisance.[38] If a canal, which is an irrigating ditch, has been constructed at great expense more than five years before the incorporation of a city through parts of certain streets of which it flows and said canal after leaving the city supplies water for the irrigation of many farms and within the city extensive and costly mills have been erected upon its banks and operated by its waters, and these industries would be injured, if not utterly destroyed, should the canal be prevented from running within the city, and at the time the canal or ditch was

34. Seele v. Deering, 79 Me. 347, 348, 10 Atl. 45, 1 Am. St. Rep. 314, citing Cushing v. Bedford, 125 Mass. 526; Lemon v. Newton, 134 Mass. 476.

35. Phinizy v. City Council of Augusta, 47 Ga. 260.

36. Indianapolis Water Co. v. American Strawboard Co., 57 Fed. 1000.

37. Whaley v. Laing, 2 H. & N. 476.

38. North Point Consol. Irrig. Co. v. Utah & S. L. Canal Co., 16 Utah, 246, 270, 8 Am. & Eng. Corp. Cas. N. S. 98, 67 Am. St. Rep. 607, 40 L. R. A. 851, 52 Pac. 168; Utah Comp. Laws 1888, § 4566.

commenced the board of supervisors of the county had been consulted about the matter and made no objection, although no formal action was taken in the matter by said board, and persons who owned all the property in what afterwards became the city, urged its construction, and the existence of the canal was recognized by the city by ordinances and by official acts regularly done after its incorporation, and said ditch or canal was continuously used to the time of suit, and the statutes of the State recognized ditches and canals as of public use and regulated such use, a decree in favor of the city declaring such canal a nuisance *per se* and ordering it to be entirely abated and that it be filled up and entirely destroyed is not justified and will be reversed. In such a case many equitable considerations operate in defendant's favor and large properties should not be destroyed unless such result necessarily follows from the application of rules of law, even though it may not be clear whether an estoppel *in pais* could be invoked. If the nuisance consists merely in the manner in which the canal is conducted and managed it would be a nuisance which could be remedied without a total destruction of the property.[39] In an Indiana case an injunction was also issued under the following circumstances: The plaintiff operated a woolen mill propelled by water supplied by an artificial race, the water from which was used also in coloring the goods manufactured, pure water being required therefor. The defendant was rapidly cutting a ditch for the draining of its streets, to discharge into the race, which would so contaminate the water thereof with filth as to render it unfit for use in coloring and this would be accomplished in two or three days, if not arrested; it would also carry sand into the plaintiff's race, obstructing the flow of water to the mill; that the defendant, an incorporated city, was making said ditch as a part of the work of grading a certain street, according to a new and changed grade thereof, a different grade having been previously established; and damages to the plaintiff resulting from such change of grade had not been assessed or tendered. The race at the point of intersection with the proposed ditch was outside

39. Fresno v. Fresno Canal & Irrigation Co., 98 Cal. 179, 32 Pac. 943.

of the city, its margin being the boundary of the city.[40] But a board of health may not arbitrarily and under pretense of abating a nuisance construct a public improvement such as a large drain, although it may have authority to condemn and abate a brook as a public nuisance and construct such improvements as will probably prevent the recurrence of the trouble.[41] An abutting owner, however, has a right to secure access to the traveled way by filling up a drain beyond the traveled roadway, and he is not liable as for a nuisance by so doing.[42] If a municipal corporation negligently constructs a drain or sewer or maintains the same in such a manner that even though it is properly constructed, it constitutes a nuisance and injures private persons or their property or endangers their health, it is liable in damages. If the nuisance is not of a permanent character but such as the city may abate at will, and when abated the injury occasioned by its maintenance will cease, the injured person can recover merely the damages which he has sustained within the period prescribed by the statute of limitations for suing. If, however, the nuisance is not of a permanent character, recovery may be had in one action of all damages, past and future, which the maintenance of the nuisance has occasioned and will occasion. In the case of permanent injury to the freehold, resulting from the proper construction and proper maintenance of any work of public improvement, the measure of damages is the difference in market value before and after the work was constructed and maintained. If the market value of property is increased by a wrongful act of a municipality it would still be liable for actual damages resulting from injury to property of a citizen. The above rules are applied in a case where the city constructed a large ditch between plaintiff's property and the road, and also built a sewer or culvert to connect this ditch with another large ditch running in a different direction, the effect of which, it was alleged, was to divert the water flowing into the last mentioned ditch, through the culvert into the ditch which had been built in front of plaintiff's property, and the result of the

40. City of Columbus v. The Hydraulic Woolen Mills Co., 33 Ind. (33 Black) 435.

41. Haag v. Mt. Vernon, 41 App. Div. 366, 58 N. Y. Supp. 581.

42. State v. Campbell, 80 Mo. App. 110, 2 Mo. App. Rep'r 534.

city's action was, that water remained in the ditch, becoming stagnant and unhealthy; that the water frequently overflowed plaintiff's premises; that the construction and maintenance of the ditch had interfered with plaintiff's access to the street, necessitating the construction by him of bridges and culverts and otherwise injured his property. The court, per Cobb, J., also said: "The nuisance complained of in this case, that is, the improper maintenance of the ditch, is not a permanent one, but rather one which can be abated by the city at any time. The nuisance complained of does not consist in the mere presence of the ditch or of the culvert, but in the manner in which they are maintained. The culvert was constructed to divert water into the ditch. The nuisance may be abated, then, either by restoring the water to its former flow, or by repairing the ditch in such a way that it will carry off the water which comes into it through the culvert. We do not think, therefore, that this is a case for the recovery of prospective damages resulting from the construction and maintenance of the ditch as a nuisance. The plaintiff is, however, entitled to recover for all legitimate damages of every kind which he has sustained, at least up to the time that he served his notice of claim upon the city authorities. He can recover for the increased expense to which he has been put in the building of bridges, etc., by reason of the construction and maintenance of the ditch. He can recover whatever actual damage he sustained by reason of sickness or by reason of injury to his property, growing out of the maintenance of the ditch in such a way as to make the same a nuisance. In a word, the plaintiff can recover all the actual damages he has sustained by reason of the wrong complained of, on the theory that the ditch as maintained is a nuisance; but he can recover nothing on the theory that the city will continue to maintain the nuisance. If, as matter of fact, it does continue to maintain it, he can bring another action for damages after they have accrued, and do this just as long as the city fails and refuses to abate the nuisance. If the rental value of the plaintiff's premises has been less during the maintenance of the nuisance and by reason of it, this would be a proper element of damage, and the damage to the plaintiff's land caused by caving and washing can also be recovered, the measure of damages being the cost of restoring his land to the condition in

which it was prior to the injury. The plaintiff has a right, however, to recover damages if his property was damaged by the construction of the ditch, even though it was properly constructed and has been properly maintained. If his freehold estate was injured by the construction of the ditch, the measure of damages would be the difference in market value before and after the construction of the ditch. The trial judge was of opinion that injury to the freehold was not a proper element of damage, under the allegations of the petition to the proof offered in support thereof. In this we think he erred. The petition claimed damages on account of diminished market value resulting from injury to the freehold, and also for the actual damages sustained on account of the maintenance of the ditch in such an improper manner as that it became a nuisance. There was evidence to authorize a recovery on both counts. Several of the charges of the court were not in harmony with this view, and a reversal of the judgment refusing a new trial is therefore rendered necessary."[43] So where different owners of property turn their drainage into a private drain pipe before it connects with a public sewer, such pipe is a single private drain under the English Public Health Act of 1890, subjecting the owner to the expense incurred in removal of the nuisance.[44]

§ 308. **Legislature may act through own agencies—Creation of sewerage district—Independent sources of pollution—When nuisance does and does not exist.**—In a comparatively recent case the construction and constitutionality of certain lagislative enactments were passed upon by the court. One statute created a sewerage district and another act was for the purpose of relieving from pollution the rivers and streams within such district. Both statutes were held constitutional. It was also held that such sewerage district was not a municipal corporation; that the powers conferred upon the sewerage commissioners were executive and administra-

43. Langley v. Augusta, 118 Ga. 590, 45 S. E. 486.

44. Seal v. Merthyr Tydfil Urban Dist. Council, 77 Law. T. R. 303 (1897) 2 Q. B. 543, 67 L. J. Q. B. N. S. 37. Examine Geen v. St. Mary (1898), 2 Q. B. 1, 67 L. J. Q. B. N. S. 557; Lancaster v. Barnes Dist. Council (1898), 1 Q B. 855 (Q. B.), 78 Law T. R. 355.

tive in character and not legislative; that in providing for the establishment, maintenance and operation of public works in order to relieve the natural streams from pollution detrimental to the health of the neighborhood, the legislature was not required to delegate the work to existing municipalities nor to establish a new municipality for the purpose, but could act directly through its own agencies. It was also decided that it was not a constitutional right of the people to have all matters of local concern entrusted to municipal corporations, that within constitutional limits the people of the State, acting through the general legislature, could delegate to the municipalities such portion of political power as they deemed expedient, could withhold other powers and withdraw any part of that delegated; that the act being constitutional in its main purpose of establishing and regulating a sewerage district, such of its provisions as incidentally regulated the internal affairs of existing municipalities in order to carry out the main purpose were not invalid as being special legislation, since the municipalities thus affected were thrown into a class by themselves from the very necessity of the case and no distinctions were made between these several municipalities except such as were germane to the purposes of legislation. But although the act relating to the pollution of the natural streams and rivers in question treated for practical purposes the situation as a public nuisance, yet to the extent that the polluting materials proceeded from municipal sewers, that by legislative license were permitted to be discharged into the rivers, such pollution could not be declared a nuisance in law so long as the license remained unrevoked, the object of the statute being to revoke the legislative authority previously given to the municipalities in that respect. A material part, however, of the pollution of the rivers proceeded from sources independent of the municipal sewers and was not covered by any legislative authority, and to that extent there might or might not be a nuisance in law. But the right of a city to so empty its sewerage into a river is merely a legislative license, revokable whenever the public health and safety require.[45]

45. Van Cleve v. Passaic Valley Sewerage Comm'rs (N. J., 1904), 58 Atl. 571.

Pueblo waters; although modern systems of house drainage may have been unknown in the foun-

§ 309. **Expert or scientific evidence as to pollution and effect thereof.**—Expert testimony is admissible to show the character and extent of the damage caused by sewage pollution; as to bacteria, the extent to which they can be carried and survive in water, and the danger therefrom.[46] In an English case where the question whether the discharge of sewage and the pollution of water constituted a nuisance, the court, per Turner, L. J., says: "We come, then, to the questions above proposed, the first of which, the question of present nuisance, is purely a question of fact, depending upon the weight of the evidence upon the one side, and upon the other there are two distinct branches of the evidence; first, what may be called the scientific evidence; and secondly, the evidence which points to the facts as they actually stand. Speaking with all possible respect to the scientific gentlemen who have given their evidence in this case, and as to whom it is but just to say that they have dealt with the case most ably and most imparially, I think that in cases of this nature much more weight is due to the facts which are proved than to conclusions drawn from scientific investigations. The conclusions to be drawn from scientific investigations are, no doubt, in such cases, of great value in aid or explanation and qualification of the facts which are proved; but in my judgment, it is upon the facts which are proved, and not upon such conclusions, the court ought, in these cases, mainly to rely. I think so the more strongly in this particular case, because it is obvious that the scientific examinations which have been made of the water of this brook must have depended much upon the state of circumstances which existed at the time when those investiga-

dation of a Spanish or Mexican pueblo, yet the right to make an outfall sewer when necessary for the health and convenience of the city of Los Angeles is held to exist since the water was granted or dedicated as much for the health and convenience of the pueblo as for any other purpose, and since it has been practically settled that the pueblo right expands with the increasing needs of the inhabitants, the right to drain the city by means of an outfall sewer and to keep the sewer in a state of efficiency by the necessary flushing, must be held to be fairly within the pueblo right. City of Los Angeles v. Pomeroy, 124 Cal. 640, 57 Pac. 585.

46. Hollenbeck v. City of Marion, 116 Iowa, 69, 89 N. W. 210. See Missouri v. Illinois (The Chicago Drainage Case), 200 U. S. part 5, given in full in § 299, herein, where similar evidence was considered.

tions took place. They might well have been affected by the force of the stream at the time of investigation, and probably by the state of the weather as tending or not tending to the diffusion or dispersion of noxious smells. In my view of this case, therefore, the scientific evidence ought to be considered as secondary only to the evidence as to the facts." [47] So evidence as to the effect of disease germs must not be purely speculative, and must be based upon facts as in case of evidence as to cholera germs being erroneously admitted, there being no evidence of the existence of such a disease in the city at the time which could have passed into its sewage.[48]

§ 310. **Character of odors, proportion and effect of discharge—Degree, nature and character of pollution generally.**—In an action for damages for a nuisance arising from discharge of sewage, the character of the odors arising from such sewage is a material part of the case, and an ordinary witness may state not only their nature but their effects as observed by him, and may state that the smell of gases from the outlet of the sewer made him sick.[49] So where a person empties foul water into a stream, reference will be had in an action against that person for such act to the proportion and effect of such discharge on the stream.[50] And if the odor from the mouth of a private drain under a public street is so slight as to have been perceptible to only a single person, and then only once out of a number of times, no injunction will be granted.[51] So evidence is admissible to show the character of filth drained into a pool in an action for maintaining a stagnant pool alleged to cause bad odors and sickness in plaintiff's family.[52] Again, the tendency of a river to purify itself owing to the rapidity of its current and other circumstances is a factor of importance in construing a statute prohibiting the deposit of offen-

47. Goldsmid v. Tunbridge Wells Improvement Commissioners, 35 L. J. Ch. 382, L. R. 1 Ch. 349, 12 Jur. (U. S.) 308, 14 L. T. 154, 14 W. R. 562, per Turner, L. J.

48. Wing v. Rochester, 9 N. Y. St. R. 473.

49. Suddith v. Incorporated City of Boone, 121 Iowa, 258, 96 N. W. 853.

50. Ridge v. Midland Ry. 53 J. P. 55.

51. Wood v. McGrath, 150 Pa. 451, 24 Atl. 682.

52. Savannah, F. & W. Ry. Co. v. Parish, 117 Ga. 893, 45 S. E. 280.

sive and polluting matter into certain waters, especially when the pollution would be almost imperceptible, or at the most, very slight, and this consideration would also apply to city sewage.[53] And if the act done, as in a case of felling trees into a stream, does not materially affect the quality of the water claimed to be polluted, an injunction will not issue.[54] So where the business of rendering carcasses is located on a river's banks, it may be carried on by a process which prevents the escape of stenches, effluvia or gases and so not constitute a pollution of the water and not be within a statute prohibiting the maintenance of similar establishments.[55] But a nuisance in polluting or fouling water may exist even though it may be imperceptible at high water, where unhealthy, offensive odors are generated by the refuse in low water.[56] It is not a question of the extent of user interfered with by pollution of a watercourse which determines the right to relief, it is sufficient if there has been an actual invasion of the right to have the water flow in its natural purity.[57] So it is a nuisance to throw from day to day into water, used for the ordinary purposes of life, any substance that renders it less pure and excites disgust in those who use it.[58]

§ 311. **Pollution of waters—General decisions.**—One invested by grant from the government with title to land, through which a water course runs, acquires thereby no greater right to the use of the water than others over whose premises the same stream passes, and cannot so use it as to corrupt or impair its quality to their prejudice or injury.[59] But a person has the right to the reason-

53. Walker v. Aurora, 140 Ill. 402, 29 N. E. 741. See Missouri v. Illinois (The Chicago Drainage Case), 200 U. S. part 5, given in full § 299 herein, it being there claimed that the water was not polluted but in fact was purified.

54. Fisher v. Feige, 137 Cal. 39, 69 Pac. 618.

55. Tiede v. Schneidtt, 105 Wis. 470, 81 N. W. 826.

56. Belton v. Baylor Female College, Tex. Civ. App. 33 S. W. 680.

57. Mann v. Willey, 64 N. Y. Supp. 589, 51 App. Div. 169, aff'd 168 N. Y. 664, 61 N. E. 1131.

58. Lewis v. Stein, 16 Ala. 214, 50 Am. Dec. 177.

Nature and extent of pollution. See Mayor & City Council of Baltimore v. The Warren Manufacturing Co., 59 Md. 96, 108.

59. Lewis v. Stein, 16 Ala. 214, 50 Am. Dec. 177.

able and beneficial use of his land, therefore permitting cattle to enter a stream of water from pasture land and to befoul the stream even though a water company is injured thereby as to its use of the water is not a ground for an injunction even though the water company is incorporated.[60] It constitutes a public nuisance, however, to befoul the waters of a non-navigable stream by maintaining hog pens and stables along its banks where a considerable number of persons use the water.[61] But where the prohibition of a statute provides against the erection of slaughter houses on the banks of a stream which shall "flow through" any city, such statute is to be construed to forbid such erection above that point where the stream "flows through" the city.[62] And where a statute prohibits the collecting or suffering filthy water, etc., to remain in public places, such statute covers a navigable stream.[63] If a spring from which travelers are accustomed to drink is located near a public highway, it constitutes a public nuisance to urinate therein.[64] A nuisance may also consist of seaweed left in a harbor by the action of the sea and there creating noxious odors injurious to health; a corporation in whom the harbor is vested is bound to remove such nuisance.[65]

§ 312. **Diversion or obstruction of water—Generally.**—Subject to such rules and qualifications hereof as appear elsewhere herein in regard to riparian rights,[66] and in so far as the same are applicable here, it may be stated that ordinarily the right of an

60. Helfrich v. Catonsville Water Co., 74 Md. 269, 13 L. R. A. 117, 22 Atl. 72, 28 Am. St. Rep. 245.

61. People, Ricks Water Co. v. Elk River Mill & L. Co., 107 Cal. 214, 40 Pac. 486.

Casting garbage into great lake. See Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030.

62. Olrich v. Gilman, 31 Wis. 495.

63. State v. Wabash Paper Co., 21 Ind. App. 167, 1 Rep'r 234, 51 N. E. 949, 48 N. E. 653.

Application of statute prohibiting deposits in Mississippi. See Witham v. New Orleans, 49 La. Ann. 929, 22 So. 38.

English Public Health Act 1875, § 17, construed as to deleterious matter. Durrant v. Branksome Urban Council, 76 Law T. R. 739, (C. A.), (1897) 2 Ch. 291, 66 L. J. Ch. N. S. 653, aff'g 76 Law T. Rep. 486, 66 L. J. Ch. N. S. 517.

64 State v. Taylor, 29 Ind. 517.

65. Proprietors of Margate Pier v. Town of Margate, 20 L. T. N. S. 564, under 18 & 19 Vict. C. 121, s. 12 (nuisances, Removal Act, 1855).

66. See §§ 265 *et seq.*, herein.

upper riparian proprietor or of a person owning the land through or over which a natural stream flows to divert the water thereof should not be unreasonably or wrongfully exercised to the material injury of adjacent land owners or lower riparian proprietors in their right to the use of the water or to have it flow without serious or material diminution or alteration.[67] But it is a perversion of the common law doctrine as to the diversion of water courses to apply that doctrine to a stream rising in springs and passing by a sinuous course under sinks and manufactories through culverts and emptying its filth, before its final discharge, into a river upon low ground in the midst of the city through which it passes, thereby endangering the health and comfort of a numerous surrounding population; and the city may divert or fill up such a stream for the protection of the lives, health and comfort of its inhabitants.[68] While the mere obstruction of a waterway is not necessarily a nuisance,[69] yet if a city obstructs a watercourse by

67. Starr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761; California Pastoral & Agricultural Co. v. Enterprise Canal & Land Co., 127 Fed. 741; Union Mill & Min. Co. v. Danberg, 81 Fed. 73; Gould v. Eaton, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181; Parke v. Kilham, 8 Cal. 77, 68 Am. Dec. 310; Dunn v. Cooper, 208 Ill. 391, 70 N. E. 339; Missouri P. R. Co. v. Keys, 55 Kan. 205, 40 Pac. 275; Kay v. Kirk, 76 Md. 41, 24 Atl. 326; Brown v. Kistner, 190 Pa. 499, 42 Atl. 885; Hughesville Water Co. v. Person, 182 Pa. 450, 41 W. N. C. 189, 38 Atl. 584; Clark v. Pennsylvania R. Co., 145 Pa. 438, 29 W. W. C. 49, 22 Pitts. L. J. N. S. 138, 22 Atl. 989, 11 Ry. & Corp. L. J. 3; Plattsmouth Water Co. v. Smith, 57 Neb. 579, 78 N. W. 275; Schultz v. Sweeney, 19 Nev. 359, 3 Am. Rep. 888; Schnitzins v. Bailey, 48 N. J. Eq. 409, 22 Atl. 732; Penrhyn Slate Co. v. Granville Elect. Light & Power Co., 84 App. Div. 92, 82 N. Y. Supp. 547; Amsterdam Knitting Co. v. Dean, 162 N. Y. 278, 56 N. E. 757, aff'g 13 App. Div. 42, 43 N. Y. Supp. 29; Lonsdale Co. v. Woonsocket, 25 R. I. 428, 56 Atl. 448; Kimberly & C. Co. v. Hewitt, 79 Wis. 334, 48 N. W. 373; Ellis v. Clemens, 21 Ont. 227. See opinion in City of Mansfield v. Balliett, 65 Ohio St. 45, 63 N. E. 86, 56 L. R. A. 628, given in full "Appendix A," at end of this chapter.

68. Murphey v. Wilmington, 5 Del. Ch. 281, a case, however, of a bill to restrain collection of an assessment for the construction of a culvert.

69. State v. Wilson, 106 N. C. 718, 11 S. E. 254, a case also as to the construction of an ordinance as to placing obstruction in waterway under N. C. Code, § 3820.

constructing a sewer so as to injure private property, it is responsible for the nuisance thereby created.[70] Nor should the flow of water be altered or interrupted for a water supply, otherwise it is injuriously affected within the English Public Health Act, and this rule holds even though no sensible damage is occasioned.[71] So a water company which conveys its reservoir and appurtenant rights to a city, but retains under a reservation in the deed, certain water rights, is liable for the nuisance created and continued by diverting the water to the reservoir whereby it is diminished in quantity as to a lower riparian owner to his injury.[72] It may also constitute both a public and a private nuisance to divert the waters of a navigable stream.[73]

§ 313. **Overflowing, flooding or casting water upon land—Generally.**—If water which would not naturally flow upon land of a neighbor is wrongfully made to flow there, it creates a nuisance *per se*.[74] So casting water upon another's land without authority or right so to do, creates a nuisance even though done by a public body.[75] And even though a city has power to condemn, it cannot without condemnation create a nuisance by flooding private property in establishing a reservoir and water works.[76] So the obstruction of a public sewer to prevent a nuisance is not authorized where the act results in overflowing another's land and damaging his property.[77] So a building owned by a municipality cannot precipitate the rainwater falling upon its roof upon the lands of an adjoining proprietor.[78] And one who purchases land and improves the same, on the line of an artificial waterway, constructed

70. Bloomington v. Costello, 65 Ill. App. 407.

71. Roberts v. Gwyrfai Dist. Council (1899), 1 Ch. 583, 68 L. J. Ch. N. S. 233; Act 1875, § 332.

72. East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 38 Atl. 631.

73. Yolo County v. City of Sacramento, 36 Cal. 193.

74. Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11.

75. Merritt Twp. v. Harp, 131 Mich. 174, 9 Det. Leg. N. 302, 91 N. W. 156.

76. City of Ennis v. Gilder, 32 Tex. Civ. App. 351, 74 S. W. 585.

77. Munson v. Metz, 1 White & W. Civ. Cas. Ct. App. (Tex.), § 245.

78. Watson v. New Milford, 72 Conn. 561, 564, 77 Am. St. Rep. 345, 45 Atl. 167.

Casting water on land. See note, 10 L. R. A. 254.

by a municipal corporation to perform the duty that it is under of keeping such artificial waterway in repair and condition to carry all of the waters that may flow therein from usual and ordinary causes, may recover damages received by the negligent flooding of his lands by waters from such artificial waterway.[79]

§ 314. **Percolations—Subterranean waters.**—When a well is supplied with water which percolates through the earth and does not flow through any defined channel, although the owner of the well is not entitled to the water until it actually enters his well, the occupier of adjoining property will be restrained from using a cesspool therein in such a manner as to pollute the water coming through his property and supplying the well.[80] This rule also applies to a privy.[81] And a privy which by percolations pollutes a stream from which a city's water supply is partly supplied, is a nuisance *per se*.[82] So a nuisance by impurities passing through subterranean streams, may also exist.[83] If tunnels or excavations are so wrongfully constructed or made as to take away or diminish the flow of waters in a stream in an ascertainable quantity and thereby divert such waters to the injury of another and an invasion of his rights, a remedy should exist therefor and be granted upon a proper showing.[84]

§ 315. **Surface waters.**—The rule as to surface waters and its exceptions and qualifications is well stated in a Minnesota case, where it is declared that: In respect to responsibility for the disposition of surface water, the common law rule prevails in Minnesota, and, subject to the reasonable restriction, applicable here as in other cases, that he must so use his own land as not to injure his neighbor, the owner of the lower or inferior estate

79. Willson v. Boise City, 6 Idaho, 391, 55 Pac. 887.

80. Wormesley v. Church, 17 L. T. 190.

81. Iliff v. School Directors, 45 Ill. App. 419. See § 405, herein.

82. Commonwealth v. Yost, 11 Pa. Super. Ct. 323.

83. Rarick v. Smith, 17 Pa. Co. Ct. 627, 5 Pa. Dist. R. 530.

As to oil carried by subterranean springs see Dillon v. Acme Oil Co., 2 N. Y. Supp. 289.

84. See Montecito Water Co. v. Santa Barbara, 144 Cal. 578, 77 Pac. 1113; Cohen v. La Canada Land & Water Co., 142 Cal. 437, 76 Pac. 47.

may, in the use and improvement of his land, obstruct or hinder the natural flow of surface water and turn the same back upon the lands of others, without liability for injuries arising from such obstruction. He is not permitted to collect it in a stream or body, and turn it upon the lands of others, to their injury. But he is not bound to provide drains or waterways to prevent the accumulation of surface water upon adjacent lands, the natural flow of which is interrupted by changes in the surface of his own lands caused by improvements thereon. But exceptional circumstances may require a modification of this rule, as in the case of ravines in which surface water is gathered into streams in well-defined channels. The rule is not modified, however, by the existence of depressions or hollows in the land in or over which mere surface drainage occurs in times of freshet; but a modification has been suggested in cases where, from the natural formation of the ground, large quantities of water, from heavy rains or melting snow, are forced into a channel, and flow in a stream through a narrow valley or ravine. In such cases it may frequently be found to be as reasonable and proper to bridge a ravine or provide a way of escape for the water through an embankment, by a suitable culvert, as in the case of natural streams; and if the channel is well defined and worn by the accustomed flowage of water therein, it assumes the characteristics of a watercourse, and circumstances may require that similar provision be made for it. And in such cases the effect of the culvert would not be to interfere with the natural flow of the waters beyond the roadbed or bridge, while under other circumstances the result migh be to gather the surface waters into streams, to the damage of lands of adjoining owners.[85] The rule in Iowa as to the right of interference with the natural flow of surface water is, that, while every man may improve his own land as he pleases, he must do so in a careful and prudent manner, so as to occasion no unnecessary inconvenience or damage to his neighbor. Accordingly, where the defendant railway company had built

85. Rowe v. St. Paul, Minneapolis & Manitoba R. Co., 41 Minn. 386, 387, 43 N. W. 76, 16 Am. St. Rep. 706.

Diminishing or impeding flow of surface water. See note, 85 Am. St. Rep. 708, 715-735.

Accellerating or increasing flow of surface water. See note, 85 Am. St. Rep. 708, 726-735.

an embankment across the plaintiff's land in such a way as to interfere with the flow of the surface water therefrom, and, in an action for damages therefor, there was evidence tending to show that the defendant could have relieved the plaintiff's land from the surface water by keeping open a ditch which had been cut along and within its right of way for that purpose, held, that there was no error in refusing to order a verdict for the defendant.[86] It is also held in that State that a city may not divert surface water from its natural course in another direction so as to flow on a lot owner's land through a drain or channel, in destructive quantities. So where a city lot is below the grade of an adjoining street, the owner cannot recover against the city for injury caused by the overflow of the lot by surface water turned thereon in slightly increased quantity by improvements of the streets, especially if the injury would not have occurred had the lot been filled up to the level of the street, though recovery is ordinarily denied one whose lot is below grade, he may recover if his injury would have resulted regardless of that situation of the lot, but where the injury to a lot by overflow of surface water is caused by the lot being filled up by the owner so as to obstruct the natural drainage, and the city, by improving its streets, has not increased the amount of the flow to an appreciable extent, the owner cannot recover against the city for the injury.[87] In North Carolina it is held that an owner of land is obliged to receive upon the same the surface water which falls on adjoining higher lands, and which naturally flows thereupon. When the water reaches his land he may collect it in a ditch and carry it to a proper outlet, but he cannot raise any dyke or barrier whereby it will be interrupted and thrown back on the lands of the higher owner; neither can the higher owner artificially increase the natural quantity or course of the surface water, by collecting it in a ditch and discharging it upon the servient land, in a different manner from its natural discharge.[88]

86. Willitts v. Chicago, Burlington & Kansas City R. Co., 88 Iowa, 281, 21 L. R. A. 608, 55 N. W. 313.

87. Hoffman v. City of Muscatine, 113 Iowa, 332, 85 N. W. 17.

88. Dawson v. Durham & Brown, 74 N. C. 767.

§ 316. **Surface waters—Instances.**—A nuisance exists where surface water is diverted from its natural flow by an embankment and actual damages need not be shown,[89] and if there is a continuing nuisance created by surface water being discharged upon adjacent property by improvements being negligently constructed by a municipality.[90] So a private nuisance arising from the discharge of surface water on a street opposite plaintiff's premises may be abated at suit of such person.[91] And a water pipe or conductor which throws water upon the walk which freezes regularly in the winter season for several years and renders the walk dangerous to the public, is a nuisance.[92] So where tracks of a railroad are raised above the established grade of a sreet, in consequence of which puddles of water, coming from rain or melting snow, are sometimes formed upon the sidewalk and remain so for days, making its use inconvenient, such facts constitute an element of damage directly attributable to the wrongful use of the roadway, and are to be considered in determining the extent of injury done to plaintiff's property in an action for obstructing a highway and depriving an abutting proprietor owning the fee therein of reasonable access to or use of his premises.[93] So a municipality which refuses to act after notice given, will be liable where it has given permission to construct railroad tracks, and such tracks obstruct street drainage to the injury of abutting land owners, even though a statutory remedy exists against the railroad company.[94] And where a town constructed a highway in such a manner that water worked through the gutter and down upon plaintiff's premises to his serious injury, it is not a case of defective highway, but a nuisance, for which the town would be liable; but a borough which succeeds to the ownership of such highway after such road is constructed, would not be liable without knowledge and without

89. Tootle v. Clifton, 22 Ohio St. 247, 10 Am. Rep. 732.

90. New Albany v. Lines, 21 Ind. App. 380, 1 Rep'r 47, 51 N. E. 346.

91. Reinhart v. Sutton, 58 Kan. 726, 51 Pac. 221.

92. Isham v. Broderick (Minn.), 85 N. W. 224, 14 Am. Neg. Rep. 112.

93. McKeon v. New York, New Haven & Hartford Rd. Co., 75 Conn. 343, 61 L. R. A. 730, 53 Atl. 656.

94. Zanesville v. Fannan, 53 Ohio St. 605, 42 N. E. 703, 35 Ohio L. J. 51. See Rev. Stat. Ohio, § 3283, as to statutory remedy.

intentionally continuing the nuisance, although the damage was done after power with relation to such highways of the town was conferred upon the borough.[95] Liability for damages also exists where an old drain lawfully constructed and controlled to some extent by a municipality is closed up so that sewage and surface water escapes during a heavy rainfall which ought reasonably to have been expected to occur.[96] Where the statute so authorizes a local authority when draining its district to make such sewers as are necessary to accomplish such drainage, it may carry such sewers into, through or under any lands within their district provided that the water so conveyed is as specified in the statutory authorization "freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or water course." But surface water charged with sand and silt is not within such proviso if the stream or water course is naturally charged therewith.[97] Again, while the owner of land through which there flows a stream of water may not divert the same so as to interfere with the enjoyment thereof by the land owners upon the stream above and below, still this rule does not apply to the water falling upon land as by rain or snow, and a municipal corporation is not liable to an action for damages, because by its streets, roofs and drains, it causes the water from rains and other water produced upon its surface, to flow upon adjoining lands which are the natural outlets of such water, even though such water is, by these means, concentrated into a stream and would otherwise have flowed over said land in many small streams.[98] So in a suit for damages, where a count in the petition alleges injury resulting to plaintiff in consequence of foul and impure matter being allowed by defendant to accumulate on his premises in such manner as to be washed by rains on land of the plaintiff, it is not error for the judge to instruct the jury that there can be no recovery on this ground if such offensive

95. Morse v. Fair Haven East, 48 Conn. 220.

96. Schroeder v. Baraboo, 93 Wis. 95, 67 N. W. 27.

97. Durrant v. Branksome Urban Council, 46 W. R. (C. A.) 134, 66 L. J. Ch. 653, 76 L. T. 739 (1897), 2 Ch. 291, aff'g 61 J. P. 472; Public Health Act, 1875 (38 & 39 Vict. C. 55), §§ 15, 16, 17, 308; Private Street Works Act, 1892.

98. Phinizy v. City Council of Augusta, 47 Ga. 260.

matter was accumulated by defendant's tenants on that portion of the premises rented from him and over which he had no control, it not appearing that the nuisance complained of on the premises of the tenants existed at the time they were rented, nor that the tenants were licensed by the landlord to erect or maintain the nuisance.[99] But a town will be enjoined against constructing a drain for the purpose of discharging surface water of a street into a deep cut or excavation made by a railroad across the principal street of a densely populated village, the street crossing the railroad cut by a bridge, it appearing that the side walls of this excavation and the railroad stations and property of the company would be injured, that the company was authorized to construct their road as they had done, and that although by reason of such manner of construction a drain for the street was necessary, yet one could be so constructed as not to injure the railroad at a greater but not unreasonable expense.[100] In an English case a canal company had a statutory power to supply it with water out of such "brooks, streams and water courses as should be found within a certain distance," it was held that it would be difficult to hold, that the mere surface water of a road, not arising from any spring or natural certain supply, could fall within the act, so far and to such an extent, as to exclude a local board of health, under the Public Health Act, from making a system of drainage essential to the district, which, offending against the rights of no one in any other particular, merely allowed to flow through gratings into the sewer the water collected on a public road from rain and from the overflowing of the surplus of the neighboring houses, which water had theretofore flowed down an open gutter into a canal.[101] The fact, however, that a city has macadamized the surface of a street and constructed catch-basins and conduits, whereby the flow of water draining from the street is accelerated, does not render it liable for damages from the overflowing of a stream into which the drainage water empties, unless the drainage is increased to an

99. Edgar v. Walker, 106 Ga. 455, 32 S. E. 582. See Brown v. McAllister, 39 Cal. 573.

100. Danbury & Norwalk Rd. Co. v. Town of Norwalk, 37 Conn. 109.

101. Manchester-Sheffield & Lancashire Ry. Co. v. Worksop Board of Health, 23 Beav. 178, 5 W. R. 279, 26 L. J. Ch. 345, 3 Jur. U. S. 304.

extent beyond that which could be accommodated by the water course in its natural condition.[102] Again, on the trial of a complaint for damages growing out of alleged negligent conduct of defendant in closing the natural course of surface water on one side of plaintiff's lot, and in not providing sufficient drainage to carry off such water, thus causing it to flood plaintiff's land during rainy seasons, it was not error for the court to charge the jury that "if the defendant used ordinary care in constructing the drain pipe, and the drainage, if any, was caused by plaintiff's negligence, then the plaintiff cannot recover." There was sufficient evidence in this case to authorize the submission of this issue to the jury.[103]

§ 317. **Artificial erections — Embankments, etc. — Railroad erections.**—As we have elsewhere stated a person should not be materially interfered with in the reasonable enjoyment of his land, and if such interference is occasioned by filth or noxious things produced on another's land, the person so injured has an action. This principle applies to preclude anyone without liability therefor, at the suit of the injured party, from causing, by an artificial erection on his own land, water, even though only arising from natural rainfall to pass into his neighbor's land. This is, however, also subject to the principle that the owner of land holds his right to its enjoyment subject to any annoyance arising from the natural user by his neighbor of his land, as in the case of an adjoining mine owner.[104] In a Massachusetts case, county commissioners

102. Syllabus to Smith v. City of Auburn, 88 App. Div. 396, 84 N. Y. Supp. 725.

103. Edgar v. Walker, 106 Ga. 454, 32 S. E. 582.

When no nuisance or liability exists from surface waters. See, also, Brown v. McAllister, 39 Cal. 573; Eaton v. People, 30 Colo. 345, 70 Pac. 426; Walley v. Platte & D. Ditch Co., 15 Colo. 579, 26 Pac. 129; Livezey v. Schmidt, 16 Ky. Law R. 596, 29 S. W. 25; Barring v. Commonwealth, 63 Ky. 95; Roberts v. Harrison, 101 Ga. 773, 28 S. E. 995; Simpson v. Stillwater Water Co., 62 Minn. 444, 64 N. W. 1144; Rychlicki v. St. Louis, 115 Mo. 662, 22 S. W. 908; Wenzlick v. McCotter, 87 N. Y. 122, 41 Am. Rep. 358; Lewis v. Alexander, 21 Ont. App. 613.

As to structural convenience under English statute 38 & 39 Vict. Chap. 55, § 94, see Kinson Pottery Co. v. Poole (1899), 2 Q. B. 41.

104. Hardman v. N. E. Ry., 47 L.

having laid out a highway through a town and across two channels of a stream, ordered the town to make an embankment, several rods from the highway, which should turn all the waters of the stream into one of its channels and prevent the necessity of making more than one bridge in the highway. The town passed no vote and did not act in the matter; but the selectmen caused the embankment to be made, and paid for making it, by an order on the town treasurer. It was held that the town was not liable to an action by the owner of land which was flooded and injured in consequence of the making of the embankment.[105] In the construction and maintenance of railroads common prudence requires that employment of at least ordinary engineering knowledge and skill to the end of avoiding injury to property, which will probably come from the obstruction of natural streams and waterways.[106] And where a railroad constructs and maintains embankments or its roadbed in such a manner that it obstructs, dams up, diverts and causes water to overflow another's land to his injury and damage, it may be liable as for a nuisance. This rule applies to the obstruction of a living stream of water which renders land boggy and marshy and which also in times of freshet affects another stream on such land turning its course and injuring the soil.[107] The rule also applies to a case where waters are permanently dammed up by a railroad and overflow a farm to the injury of a reversioner's interest;[108] to an embankment constructed of material which washes out and is deposited on another's land and to an insufficient and inadequate culvert;[109] to an embankment which has not adequate openings to carry off waters reasonably to be expected;[110] to a roadbed so constructed that water is obstructed within the limits of a city or town and becomes stagnant and offensive.[111] So a structure

J. P. 368, 3 C. P. D. 168, 38 L. T. 339, 26 W. R. 489, C. A. See Turner v. Mirfield, 34 Beav. 390.

105. Anthony v. The Inhabitants of Adams, 1 Metc. (42 Mass.) 284.

106. Southern Ry. Co. v. Platt, 131 Ala. 318, 31 So. 33.

107. Smith v. Philadelphia & R. R. Co., 57 Fed. 903.

108. Kankakee & S. R. Co. v. Horan, 131 Ill. 288, 41 Am. & Eng. R. Cas. 13, 23 N. E. 621, aff'g 30 Ill. App. 552.

109. Wabash R. Co. v. Sanders, 58 Ill. App. 213.

110. Missouri P. R. Co. v. Webster, 3 Kan. App. 106, 42 Pac. 845.

111. Rosenthal v. Taylor, B. & H. R. Co., 79 Tex. 325, 15 S. W. 268.

which dams up a waterway and causes the water to spread dangerously from its natural course, may amount to a nuisance, and the maintenance, as well as the erection of a nuisance, with knowledge of its harmful character, may create a liability for resultant injuries.[112] So a railroad embankment within the limits of a municipality may cause a public nuisance.[113] So a railroad embankment with an insufficient culvert whereby waters overflow another's land, such embankment being at the intersection of a city street and an alley, is a public nuisance.[114] And where a rainfall, if any great quantity cannot be carried away by a culvert under a railroad embankment, such culvert being for the flowage of water in its natural course, there exists a continuing injury or nuisance.[115] While those engaged in such undertakings as constructing and maintaining railroads are not bound to provide against floods, of which the usual course of nature affords no premonition, yet they are bound to use ordinary care to build so as not to obstruct to the damage of others, rainfall waters such as may reasonably be expected whether they are likely to be of frequent or of rare occurrence. Though a defendant has acquired the railroad after an embankment complained of was built, its character and that of the stream and surrounding country together with common knowledge with which it was legally charged concerning rainfalls to which the country was subject, may have been sufficient to show it had notice of the consequences which would naturally follow from continuing the existing conditions.[116] But where a railroad bridge and its approaches are situate upon land conveyed to a railroad company for its right of way, it must be held to have been conveyed to enable the purchaser to use it as it then was, and an action does not lie as for nuisance where, owing to the method of construction of the bridge, there is caused an accumulation of floodwood, debris and gravel under said bridge causing an overflow on the grantor's land. The principle of such a case seems to be that a person having con-

112. Southern Ry. Co. v. Platt, 131 Ala. 318, 31 So. 33.

113. Baltzeger v. Carolina Midland R. Co., 54 S. C. 242, 32 S. E. 358, 71 Am. St. Rep. 789, 14 Am. & Eng. R. Cas. N. S. 845.

114. Kelley v. Pittsburgh, C. C. & St. & L. R. Co., 28 Ind. App. 457, 63 N. E. 233.

115. Ecton v. Lexington & E. R. Co., 21 Ky. L. Rep. 921, 53 S. W. 523.

116. Southern Ry. Co. v. Platt, 131 Ala. 318, 31 So. 33.

veyed the land with the structure for the purpose of enabling the purchaser to continue its use as he was then using it, he cannot deprive the purchaser of the benefit by claiming that it constitutes a private nuisance.[117] If the volume of water carried by a railroad culvert is not increased, the company will not be liable for a nuisance arising from noxious odors, injurious to health and liable to produce disease, arising from filthy deposits of decaying matter from the flowing of polluted water from the railroad's right of way onto another's land.[118] It is also held, notwithstanding the preceding decisions, that if a railroad embankment is constructed under proper authority, no liabiliy as for a public or private nuisance exists even though the passage of water of running streams is not adequately provided for.[119]

§ 318. **Mills, mill races and streams, mill sites and mill owners—Rebuilding mill.**—A flouring mill in a city is not *per se* a nuisance.[120] And in order to constitute a mill a nuisance, as erected upon tide waters, it should appear to stand within the flow of common and ordinary tides.[121] And although a mill race may obstruct a street, yet it is not a nuisance *per se* where the street was plotted in a city addition subsequent to the construction of the race.[122] But a stream across a highway for the use of a mill is a nuisance, where a bridge necessary for protection of the public is out of repair and unsafe, to the extent that the cost of repairs made to the bridge by a town may be recovered back from the one who maintains the stream.[123] And where one owns a mill site on land over which a railroad has a right of way, he may hold the company liable as for a private nuisance where it, without necessity there-

117. McDonald v. Southern Cal. R. Co., 101 Cal. 206, 35 Pac. 643, 646.

118. Brimberry v. Savannah, F. & W. R. Co., 78 Ga. 641, 3 S. E. 274.

119. Ridley v. Seaboard & R. R. Co., 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708. But, see, as to the governing principles, §§ 278, 289-291 herein, and City of Mansfield v. Balliett, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628, given in full "Appendix A," at end of this chapter. See, also, 2 Shearman & Redfield on Neg. (5th ed.) §§ 728, 731.

120. Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378.

121. Simpson v. Seavey, 8 Greenlf. (Me.) 138, 22 Am. Dec. 228.

122. Denver v. Mullen, 7 Colo. 345, 3 Pac. 693.

123. Clay v. Hart, 55 N. Y. Supp. 43, 25 Misc. 110.

for, deposits in the stream stone and other refuse which raises therein a bar or obstruction to his injury.[124] While a mill owner has the right in the ordinary use of his mill to discharge in a reasonable manner waste, etc., therefrom into stream, yet he cannot abuse this right and unnecessarily and wantonly discharge such waste and refuse in such an unreasonable manner, having regard to his beneficial use of the water, as to injure inferior heritors.[125] And a substantially like principle would preclude such mill owner from depositing refuse without care or oversight in such a manner that in times of freshet it is carried down upon plaintiff's lands for the owner is bound to know that freshets are liable to occur.[126] Where a mill of public utility existed at the time of purchase by one claiming that its rebuilding will injure the family's health, and it is being rebuilt on the same old site, equity will not interfere, the plaintiff alone claiming injury.[127]

§ 319. **Dams.**—A dam across a stream may be either a public or private nuisance.[128] So where the owner of one bank of an unnavigable river erects a dam across it in such a manner as to injure other owners of the banks and tenants in common of the stream, it constitutes a private and not a public nuisance.[129] And it may be a nuisance *per se* to obstruct the waters of a natural stream by a dam even though it is erected for a water supply.[130] But if the act of maintaining a dam has not essentially increased the nuisance and it is no greater nor of any different character from what would have existed independent of defendant's act, he is not punishable therefor.[131] Where a mill and mill seat are conveyed by deed as such, by metes and bounds, the dam will pass as appurtenant to the mill seat, though it is not included within the metes and bounds given, and does not abut on the land described. So in a prosecution

124. Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 19 S. E. 521, 23 L. R. A. 674, 57 Am. & Eng. R. Cas. 694.

125. Jacobs v. Allard, 42 Vt. 303, 1 Am. Rep. 331.

126. Washburn v. Gilman, 64 Me. 163, 18 Am. Rep. 146.

127. Atty.-Genl., Eason v. Perkins, 17 U. C. 38.

128. Richards v. Daugherty, 133 Ala. 569, 31 So. 934.

129. Moffett v. Brewer, 1 G. Greene (Iowa), 348.

130. Fox v. Fostoria, 8 Ohio C. Dec. 39, 14 Ohio C. C. 471.

131. Beach v. People, 11 Mich. 106.

for a nuisance, in the erection and continuance of a mill dam the defendant justified under an act of the legislature authorizing his grantor to construct the dam. The deeds given in evidence to show the defendant's title described only the mill seat by metes and bounds, and to show his title to the dam, the defendant offered to prove that the dam was built by the person to whom the legislative grant was given, and that he and his grantees had ever since been in possession under a claim of right from him. It was held that the evidence offered was competent, and was sufficient evidence of title against all other persons except the owners of the banks.[132]

§ 320. **Dams continued.**—If an individual erects a mill dam which occasions sickness, and disease he is responsible for the consequences and it is immaterial whether the injury is a public or private nuisance.[133] So a mill dam across an unnavigable stream is a nuisance if erected or maintained in such a manner as to injure the health or comfort of others.[134] A dam is also a nuisance where it endangers or impairs health or injures or depreciates property by causing waters to become stagnant in pools or otherwise, or to accumulate filth, refuse and other deleterious and noxious matter, so that the air is infected, tainted and corrupted with unwholesome, noxious vapors and poisonous effluvia.[135] And this rule applies to a case where such filth-impregnated water flows into cellar of a building on the banks of the stream obstructed by a dam.[136]

132. Neaderhouser v. The State, 28 Ind. (28 Harr.) 257, 258.

133. Story v. Hammond, 4 Ohio, 376.

134. State v. Close, 35 Iowa, 570.

135. People v. Pelton, 36 App. Div. 450, 55 N. Y. Supp. 815, aff'd 159 N. Y. App. 15, 53 N. E. 1129; Adams v. Popham, 76 N. Y. 410; City of New Castle v. Raney, 6 Pa. Co. Ct. R. 87, rev'd on another point. See id. 130 Pa. 546, 18 Atl. 1066, 27 Am. & Eng. Corp. Cas. 566, 47 Phila. Leg. Int. 416, 25 W. N. C. 246, 20 Pitts. L. J. N. S. 345, 6 L. R. A. 737; State v. Rankin, 3 S. C. (3 Rich.) 438, 16 Am. Rep. 737; Rhodes v. Whitehead, 27 Tex. 304, 84 Am. Dec. 631; Miller v. Truehead, 4 Leigh (Va.), 569; Douglass v. State, 4 Wis. 387. Examine Leonard v. Spencer, 108 N. Y. 338, 13 N. Y. St. R. 653, 28 W. D. 368, 15 N. E. 397, 11 Cent. R. 98, aff'g 34 Hun, 341.

136. Masonic Temple Assoc. v. Banks, 94 Va. 695, 27 S. E. 490.

§ 321. **Dams continued—Back water.**—As we have elsewhere stated every proprietor of the soil through which a stream passes has a right to have it run in its natural current without diminution or obstruction. The difference of level between the surface where the stream first touches his land, and the surface where it leaves it, is the privilege of water power, which the proprietor may use and appropriate in any way desired by him for his advantage, without interruption on the part of others, and any interference on the part of others will subject the wrongdoer to all the consequences imposed by law thereon. An inferior proprietor may not, by any dam however useful to him, throw back the water in any appreciable degree, however small, upon the proprietor above him, and if he do so he would be guilty of an actionable nuisance, for which a remedy is provided.[137] So it constitutes a nuisance which will be abated where a dam is erected by a lower mill owner so that water is backed upon a prior upper mill owner's wheel.[138] And in an action for damages for obstructing a stream of water by means of a dam, by which the water was backed upon the plaintiff's mill wheel and caused to overflow his land, evidence of an obstruction at a different place, and different form from that alleged, is inadmissible.[139] Where the plaintiff and defendants were riparian proprietors, and the defendants erected a mill dam at a place where they owned the land on both sides of the stream, but caused the water to flow back in the channel of the stream ten or eleven inches, whereby a valuable mill-shoal of the plaintiff was drowned to that extent; it was held that the throwing back the water in the channel of the creek by the defendants, was an invasion of the plaintiff's right of property, and that he was entitled to maintain an action for the protection of that right, and to recover nominal damages; although the water was not thrown out of the banks of the creek, and no perceptible damage could be shown. It was also decided that the plaintiff was entitled to show to what extent he had been damnified in consequence of the back water, although the same was not thrown out of the natural banks of the stream.[140] The right of a

137. (Liles) Lyles v. Cawthorne, 78 Miss. 559, 564, 29 So. 834.

138. Stumbo v. Seeley, 23 Neb. 212, 36 N. W. 487. Examine Van Bergen v. Van Bergen, 3 Johns. Ch. (N. Y.) 282.

139. Pickett v. Condon, 18 Md. 412.

140. Frederick v. Cook 4 Ga. 241.

riparian owner to stop the flow of water upon his own land, and thereby cause it to flow back upon the lands of the proprietor above him, is not a right incident to the ownership of the soil, but an easement which can only be acquired by grant, or by an adverse possession so long continued as to raise a legal presumption of a grant.[141]

§ 322. **Dams continued—Overflow, flooding.**—If a dam obstructs the natural flow of water so that the necessary and inevitable consequence of such obstruction is the inundation of all the adjoining lands, the surface of which is no higher than the obstruction, and vegetation and fences are injured thereby and the land rendered almost valueless, such dam will be abated and perpetually enjoined.[142] So facts are stated sufficient to constitute a cause of action where it is averred in substance that certain waters arising in springs come together upon the defendant's land and that their natural outlet is in a depression or pond on said land; that none of the waters flow naturally upon plaintiff's land except in time of overflow; that the defendant had, by building a dam, diverted these waters, prevented them from following their natural course over his own land, and so caused them to leave their natural course and run upon plaintiff's land, rendering the same unfit for cultivation; that defendants are threatening to continue the dam and divert the water and also asking for damages. The complaint designated the stream of water as a "water course."[143] A railroad company is also liable where it persistently continues the maintenance of a dam over a stream on land of another so as to prevent its cultivation.[144] And a dump or dam which obstructs the natural flow of water and causes it to overflow another's premises to his injury, is a ground for damages.[145] So the flooding of a pub-

141. Hahn & Harris v. Thornberry, 7 Bush (Ky.), 403, 406, citing 2 Washburn on Real Property, p. 66. See Luning v. State, considered in next following section—text for note 148, next following.

142. Hahn & Harris v. Thornberry, 7 Bush (Ky.), 403.

143. Maxwell v. Shirts, 27 Ind. App. 529, 87 Am. St. Rep. 268, 61 N. E. 754.

144. Southern Ry. Co. v. Cook, 117 Ga. 286, 43 S. E. 697.

145. St Louis, Alton & Terre Haute Rd. v. Ellis, 58 Ill. App. 110.

lic highway and the formation of ice gorges therein on several occasions during each year, constitutes such an injury as to warrant the court to abate as a nuisance a mill dam situate in a city which is the cause of such injury.[146] If, however, the dam built causes an injury by overflow and such nuisance is of a permanent character, only one action lies and that against the party causing the injury and not against his grantee who has done no act complained of except to maintain the dam as purchased.[147] The right given by a general mill dam law, though it is a valid act, to erect a mill dam and flow the land of others, is no defense to an indictment, if the dam creates a public nuisance; such an act, though it gives a right to build a dam and flow water upon the lands of others, does not give a license to create and continue a public nuisance.[148]

§ 323. **Dams continued—Overflow and flooding—Evidence.**—The existence of a nuisance caused by a dam may, it is held, be proven by a judgment at law for damages for flooding land.[149] If land is overflowed by back water caused by the erection of a dam, it is competent to show by expert testimony the effect of obstructions in causing back water. Evidence to show that there are certain streams and springs in the neighborhood is also admissible as tending to show directly, although not conclusively, that the high water and overflow were not caused by the dam but by natural causes.[150] And in an action for directing a watercourse by the construction of a dam where one of the questions to be determined is the course and terminus of the watercourse, it is not error to permit a witness acquainted with the location to testify as to his observations of the course of the water a number of years before

146. City of New Castle v. Raney, 6 Pa. Co. Ct. R. 87, rev'd on another point, see id. 130 Pa. 546, 20 Pitts. L. J. N. S. 345, 47 Phila Leg. Int. 415, 6 L. R. A. 737, 25 W. N. C. 246, 27 Am. & Eng. Corp. Cas. 566, 18 Atl. 1066.

147. Bizer v. Ottumwa Power Co., 70 Iowa, 143. See chapters herein on remedies.

148. Luning v. State, 2 Pin. (Wis.) 215, 1 Chand. (Wis.) 178, 52 Am. Dec. 153.

149. Harmon v. Carter (Tenn. Ch.), 59 S. W. 756.

150. Grigsby v. Clear Lake Water Co., 40 Cal. 396.

that. Testimony is also competent in such case which tends to show the condition of the lands around such watercourse.[151]

§ 324. **Increasing height of dam—Whether flash boards part of dam.**—A court of equity has power to restrain one from increasing the height of his mill-dam, if such increase of height would be productive of loss of health in the family of another residing in the neighborhood of the mill, nor does it matter whether the mill is in the town or the country.[152] In a case in the Missouri Court of Appeals it is held that if a statute provides that all dams, stoppages or obstructions of watercourses not made according to law shall be deemed public nuisances and dealt with as such, and if a watercourse is obstructed by raising a dam across it above its prior height it is a public nuisance and should be abated, and a statute which accords certain privileges in regard to proposed dams for the benefit of owners of public grist mills, does not apply to companies organized to furnish light and water to cities. And where the increased height may be reduced and the dam restored to its previous height without great expense or depreciation of defendant's property, the court will so order in a case where the rule is applicable that a public nuisance will be restrained at the suit of a private person who suffers a special injury, when the circumstances render relief by injunction appropriate and the plaintiff has obtained damages in a legal action, and the nuisance is continuous or recurrent. If, however, in such a case as this, defendant's plant would be destroyed or largely diminished in value, equity might and probably would hesitate to grant an injunction.[153] As to flash boards it is held that they may be considered as part of a dam if actually used, and that if an overflow is occasioned by their use the party using them would be liable for the injury, even

151. Maxwell v. Shirts, 27 Ind. App. 529, 87 Am. St. Rep. 268, 61 N. E. 754, as to extent of.

Water beyond original channel—Evidence showing extent of flooding. See City of Ennis v. Gilder, 32 Tex. Civ. App. 351, 74 S. W. 585.

152. Minor et al. v. De Vaughn, 72 Ga. 208; Norwood v. Dickey, 18 Ga. 528.

153. Scheurich v. Southwest Missouri Light Co., 109 Mo. App. 406, 84 S. W. 1003, Rev. Stat. 1899, § 8752, id. Chap. 131, citing Southwest Missouri Light Co. v. Scheurich, 174 Mo. 235, upon the point that the dam was a public nuisance.

though not in use all the time, but where the defendant has continued the nuisance, and is not the original creator thereof, such evidence would be material upon the question of notice to defendant to abate. The damages would depend upon the amount of land flowed, whether caused by such flash boards or by the more permanent part of the dam.[154] But it is also decided that, in an action on the case against the purchaser of a dam with flash boards upon it, for flowing water upon plaintiff's land, it is a question of fact whether such flash boards are or are not a part of such dam.[155]

§ 325. **Construction of dam by municipality.**—As a general rule a municipal corporation is not responsible for the unauthorized and unlawful act of its officers, though done *colore officii;* but when such corporation itself expressly authorizes such act, or when done adopts and ratifies it, and retains and enjoys its benefits, it is liable in damages. This rule applies in an action for damages occasioned by the construction and maintenance of a dam and for an injunction restraining its maintenance so as to interrupt the flow of water in the stream, occasioning injury to plaintiff in operating his mill; for while the plaintiff had no property in the water itself he had an interest in it as it passed along through his land, as it was accustomed to run, and a wrongful and unlawful interference with it so as to materially interrupt or diminish the natural flow of the stream to plaintiff's damage would constitute a cause of action.[156] So, neither a board of health nor a municipality has the authority, where the statute confers no power, to appropriate private property for public uses, nor provides compensation for damages for such appropriation, to abate a nuisance on adjacent land by the erection of a dam upon the land of a private person without his consent; and such acts being beyond the power and authority of a city to do, it cannot be held responsible in damages where the acts are done under illegal and void votes of the

154. Grigsby v. Clear Lake Water Co., 40 Cal. 396, 407.

155. Noyes v. Stillman, 24 Conn. 15. See Occum Company v. Sprague Mfg. Co., 34 Conn. 529.

156. Schussler v. Board of Commissioners of H. County, 67 Minn. 412, 69 Am. St. Rep. 424, 70 N. W. 6, 39 L. R. A. 75.

city council, even though a part of the damages were occasioned by the negligent construction of the dam.[157]

§ 326. **Dams—Navigable waters.**—The maintenance of a dam across a river which in its natural state is a public highway constitutes a continuing nuisance and an indictable misdemeanor, unless authorized by the legislature, and where the authority given for such structure is conditioned upon the construction of a canal and its appurtenances, to be used in connection with the dam, so that through the whole work the navigation of the highway might be improved, such canal and appurtenances must be provided, otherwise the dam becomes an unauthorized obstruction to navigation and the party maintaining it maintains a nuisance, and although no period is fixed by the legislature for completing the work, yet it must be considered that the scheme was an entirety.[158] And where an act provides that a dam shall be built with a suitable slope or lock, so as not to interrupt navigation, the omission to provide such slope or lock will not deprive the party of the benefit of the law, when it does not appear that any person since the erection of the dam has either attempted or desired to navigate the river at that point, and especially when it is clear that it never was used, or was capable of being used, as a navigable highway, in the proper sense of the term.[159] In a comparatively recent case in the Supreme Court of the United States,[160] the court says: "As an original proposition we have repeatedly held that, in the absence of legislation by Congress, a State has power to improve its lands and promote the general health by authorizing a dam to be built across its interior streams, though they were previously navigable to the sea by vessels engaged in the coastwise trade. This was decided in Wilson v. Black Bird Creek Marsh Co.,[161] in a brief but cogent opinion by Mr. Chief Justice Marshall. An act of the State of Delaware gave the defendant the right to build a dam

157. Cavanagh v. Boston, 139 Mass. 426, 52 Am. Rep. 716, 1 N. E. 834.

158. State v. Dundee Water Power Land Co. (N. J., 1904), 58 Atl. 1094.

159. Neaderhouser v. The State, 28 Ind. (28 Harr.) 258. See State v. Elk Island Boom Co., 41 W. Va. 796, 24 S. E. 590.

160. Manigault v. Springs, 199 U. S. 477, 478-480.

161. 2 Pet. (U. S.) 245.

across the Black Bird Creek, the constitutionality of which act was attacked as an abridgement to use it for the purposes of navigation. 'But this abridgement,' said the court,[162] 'unless it comes in contact with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance.' The act was sustained.[163] We do not think the provision of the Constitution of South Carolina interferes with these common law powers of the State over its navigable waters." The court then considers certain cases,[164] and then says: "While all of these cases turned upon the

162. P. 251.

163. See, also, Pound v. Turck, 95 U. S. 459; Gilman v. Phila., 3 Wall. (U. S.) 713; Huse v. Glover, 119 U. S. 543.

164. "In Escanaba Company v. Chicago, 107 U. S. 678, 688, it was held that the right of bridging navigable streams extended to the State of Illinois, notwithstanding that the ordinance of 1787, for the government of the Northwest Territory, contained a clause declaring that 'the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between them, shall be common highways and forever free.' The power to span these rivers by bridges was put, partly upon the theory that the limitations upon the power of the State whilst in a territorial condition ceased to have an operative force except as voluntarily adopted by her after she became a State of the Union, and partly upon the theory, as said by Mr. Justice Field, page 689, that 'all highways, whether by land or water, are subject to such crossings as the public necessities and convenience may require, and their character as such is not changed if the crossings are allowed under reasonable conditions, and not so as to needlessly obstruct the use of the highway.' So, also, in Cardwell v. Bridge Co., 113 U. S. 205, a provision in the act admitting California, that 'all the navigable waters within the said State shall be common highways and forever free,' was held not to deprive the State of the power possessed by it to authorize the erection of bridges over navigable waters. Said the court, page 211, 'the clause, therefore, in the act admitting California, quoted above, upon which the complainant relies, must be considered, according to these decisions, as in no way impairing the power which the State could exercise over the subject if the clause had no existence.' To the same effect are Williamette Iron Bridge Co. v. Hatch, 125 U. S. 1; Hamilton v. Vicksburg, &c., R. R. Co., 119 U. S. 280, 284. In Lake Shore R. R. Co. v. Ohio, 165 U. S. 365, it was held that the act of September 19, 1890, conferring upon the Secretary of War the authority to direct the alteration of such bridges so as to render navigation easy and unobstructed, did not deprive the States of au-

power of the State to authorize the erection of bridges, the same principle applies where the legislature deems it necessary to the public welfare to make other improvements for the reclamation of swampy and overflowed lands, though certain individual proprietors may thereby be subjected to expense. The question whether Kinlock Creek could be obstructed without the permission of the secretary of war, does not arise in this case and is specially disclaimed by the plaintiff." [165] So a dam may obstruct navigation and it is not a public nuisance though without any sluice where it is erected under the lawful authority in a floatable stream where it is erected to subserve a purpose beneficial to the public, such as a mill.[166] It is declared in an early Maryland case that whenever in the course of a stream, it ceases to be a public highway for commerce between one State and another, at that point its national character terminates, and above that it is within the exclusive jurisdiction of the State, and a legislative act authorizing its obstruction by a mill-dam is a good defense to a prosecution for a nuisance.[167]

§ 327. **Restoration of dam—Parol license.**—If the restoration of a dam would constitute a pond a nuisance so as to injuriously affect health, equity will grant relief.[168] And a dam erected to restore natural conditions existing in a creek which had been lowered below a river will be limited by the court to a height not greater than the natural river bank.[169] In a Georgia case it is decided that if the person who originally erected a dam had, as against another, the right, without liability, to maintain the structure at a given height, such person had also the right to repair leaks in it, or rebuild in case it washed away; and his successor in title acquired all his rights in the premises, and would not be

thority to bridge such streams." Manigault v. Springs, 199 U. S. 477, 478-480. See §§ 272-274 herein.

165. Manigault v. Springs, 199 U. S. 477, 478-480.

166. Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 19 S. E. 521, 57 Am. & Eng. R. Cas. 694, 23 L. R. A. 674. See §§ 272-274 herein.

167. Neaderhouser v. The State, 28 Ind. (28 Harr.), 258.

168. De Vaughn v. Minor, 77 Ga. 809, 1 S. E. 433.

169. Wallace v. Farmers Ditch Co., 130 Cal. 578, 62 Pac. 1078.

liable in damages for exercising the same, either to the person against whom the original right existed, or his privies in estate. It is also held that a parol license, until acted upon, is ordinarily revocable; but where it has been acted upon, and money expended on the faith of it, it becomes irrevocable. If a dam has been erected under a parol license, and no expense at all has been incurred except in its erection, and it washes away, the party granting the original license may then revoke it before the other has incurred any expense in rebuilding; but where, in connection with the dam, money had been expended for buildings, machinery, etc., the mere washing away of the dam alone would not authorize a revocation of the parol license. The successor in title of one having rights under a parol license is not liable in damages for exercising such rights, either to the person against whom the original rights existed, or to his privies in estate.[170]

§ 328. **Prescription.**[171]—It is declared in a Maine case that there is no doubt that the right to pollute a stream to a greater extent than is permissible of common right may be acquired by prescription.[172] But something more than a trivial and occasional use is required.[173] It is held, however, that a right to maintain a dam as against the public cannot be acquired by prescription, but such a right may be acquired as against a prvate owner where the injury is special.[174] A person is not entitled so to use his own lands as thereby to pollute water that eventually mingles by means of natu-

170. Middlebrook v. Wayne, 96 Ga. 452, 23 S. E. 398.

171. See § 53 herein.

172. Masonic Association v. Harris, 79 Me. 250, 255, 9 Atl. 937.

173. Brown v. Dunstable (1899), 2 Ch. 378, 68 L. J. Ch. N. S. 498.

174. Charnley v. Shawano Water Power & River Imp. Co., 109 Wis. 563, 85 N. W. 507, 53 L. R. A. 895.

As to public nuisance and prescriptive right to maintain culvert which causes overflow of land, see Kelly v. Pittsburgh, C., C. & St. L. R. Co., 28 Ind. App. 457, 63 N. E. 233.

As to diversion by dams and prescriptive right, see Bliss v. Grayson, 24 Nev. 422, 56 Pac. 231, 25 Nev. 329, 59 Pac. 888.

As to ancient sewers and English Rivers Pollution Prevention Act, 1876, see Yorkshire West Riding Council v. Holmfirth Urban Sanitary Authority, 63 L. J. Q. B. N. S. 485, (C. A.) (1894), 2 Q. B. 842, 9 Rep. 462, 59 J. P. 213, 71 L. T. N. S. 217.

ral underground passages, into which he has introduced it, with an open stream passing through his neighbor's land to such a degree as to render the water of that stream unfit for a purpose for which his neighbor has acquired a prescriptive right to use it.[175] But it is held that the abstraction of water from a natural stream openly and under a claim of right, for a period of twenty years, to a tenement not abutting on the stream, will create no easement to have pure water flow down the stream to the point of abstraction.[176] In an English case the defendant occupied paper mills on the banks of a stream, into which he discharged the refuse of his manufacture. A prescriptive right to foul the stream had been acquired by defendant's predecessor in the occupation of the mills. Those predecessors used rags in the manufacture of paper. Soon after defendant came into occupation of the mills he introduced into, and employed in, the manufacture a new raw material called esparto grass. Upon a suit by a neighboring occupier to restrain the defendant from fouling the stream to the plaintiff's injury, it was contended that, independently of any increased fouling of the stream, the plaintiff had a right to the injunction by reason of the nuisance caused by the use of esparto grass, being a new kind of nuisance in respect of which no prescriptive right had been acquired by the defendant. It was held that it was not sufficient for the plaintiff to show that the defendant used in his manufacture a new raw material, but that he must show further a greater amount of pollution and injury arising from its use; and that the onus of showing this, lay on the plaintiff. The plaintiff not having shown this, his bill was dismissed with costs.[177]

175. Hodgkinson v. Ennor, 4 B. & S. 229; 32 L. J. Q. B. 231; 9 Jur. (N. S.) 1152; 8 L. T. 451; 11 W. R. 775.

176. Stockport Water Works Co. v. Potter, 3 H. & C. 300, 10 Jur. (N. S.) 1005, 10 L. T. 748.

177. Baxendale v. McMurray, L. R. 2 Ch. 790, 16 W. R. 32.

The rights of tin-bounders according to the customary law of Cornwall to the use of water within their tin bounds, for the purpose of streaming their tin, will not prevent the acquisition by another of a prescriptive right under 2 and 3 Will. 4, c. 71, to the enjoyment of the water by a twenty years' user; nor will this right be affected by an agreement with the tin-bounders for a money payment to abstain from fouling the water by streaming their tin therein. Gared v. Martyn, 19 C. B. (N. S.) 732, 34 L. J. C. P. 353,

§ 329. **Damages—Pollution of water, overflow, flooding, etc.** —A distinction exists between a permanent and temporary injury.[178] In an Alabama case where an action to recover damages to land resulting from the pollution of a stream, is brought by the executor of a lower riparian owner, who had held possession of the land, as such executor since the death of his testator, it is held that the damages coverable are not limited to the diminution of the rental value of the land for one year; but are the difference between the value of the land with and without the injury complained of.[179] In Connecticut where by the pollution of a stream the plaintiff sustains injury, the damage which consists in the depreciation of the usuable value of his property directly caused by defendant's wrongful act may be ascertained without determining with mathematical certainty the precise amount of that value with the stream unpolluted and its precise amount after pollution. The amount of damage in such case is intrinsically approximate, depending largely upon the sound judgment of the trier, and it is sufficient if the evidence furnishes data from which damages to the amount found by the court may be inferred with reasonable certainty and without resort to mere conjecture. Nor is the absence of evidence of opinions of neighbors, as to the rental value of the property, a legal bar to the ascertainment of damages from other testimony.[180]

11 Jur. (N. S.) 1017, 13 L. T. 74, 14 W. R. 62.

Presumption as to nuisance. Two bolts, or heaps of stones, made use of in throwing and landing nets, had been used in the Tweed from time immemorial, and although they were admitted to be nuisances now, yet the court could not pronounce that they were so at the time of the erection, but on the contrary, intimated an opinion that the presumption ought to be that at first they were not nuisances. Rex v. Bell, 1 L. J. (O. S.) R. B. 42.

178. Joyce on Damages, § 2150. See, also, Cleveland, C., C. & St. L. Ry. Co. v. King, 23 Ind. App. 573, 55 N. E. 875.

179. Drake v. Lady Ensley Coal, Iron & R. Co., 102 Ala. 501, 24 L. R. A. 64, 14 So. 749, 48 Am St. Rep. 77.

180. Dudley v. City of New Britain, 77 Conn. 322, 59 Atl. 89, per Hammersley, J. The court below included in the estimate of damages the sum of $1,200 for rental value. There was a default and hearing in damages. The court also said in this case: "Had the defendant formally claimed that in this case the plaintiff could not ask the court to resort to mere arbitrary conjecture for the ascertainment of the damage, but

Again, personal discomfort or inconvenience to plaintiff from a nuisance, caused by the deposit of sewage and the consequent offensive condition of things upon his land is immaterial, even though he does not reside upon the land or never visits it, and although its selling or rental value is unimpaired, nominal damages at least should be awarded in such a case.[181] Under a Georgia decision, evidence of depreciation in rental value of property may be given to show special damage caused by a public nuisance, such as a stagnant city pool of water.[182] And in that State the measure of damages for any illegal overflow of lands is the actual damage coming to the land by such illegal overflow.[183] In an Illinois case, if the nuisance consists in the discharge of sewage over lands of the plaintiff and the work has been done in a skillful manner and the best material employed in its construction, the damages actually sustained is the measure of recovery, and punitive damages are not recoverable.[184] In Indiana a recovery may be had, in an action for damages for polluting a stream, for temporary loss of the use of plaintiff's land where a claim is made for the "rental and market value of said lands" and this, with other allegations, shows that the damages sought to be recovered were not exclusively for permanent injuries to the real estate itself, but chiefly for such as temporarily interfered with the present use of the premises for residential and farming purposes, and for the raising of stock, and the very nature of the acts complained of constituted them a continuing nuisance rather than a permanent injury to property, and the measure of damages would be the depreciation in rental value caused thereby.[185] And in that State the

would be entitled to recover only a nominal sum, unless in some way he showed by evidence, data and means from which the court could ascertain and fix the amount of damage, the court would doubtless have sustained that claim, and we must assume that the court applied this rule in weighing the evidence produced."

181. Watson v. New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345.

182. Savannah, F. & W. R. Co. v. Parish, 117 Ga. 893, 14 Am. Neg. Rep. 540-4, 45 S. E. 280.

183. Phinizy v. City Council of Augusta, 47 Ga. 260.

184. City of Jacksonville v. Lambert, 62 Ill. 519.

185. Muncie Pulp Co. v. Martin (Ind., 1904), 72 N. E. 882. See Cleveland, C., C. & St. L. Ry. Co. v. King, 23 Ind. App. 573, 55 N. E. 875.

difference in value of abutting land before and after its injury by a stream being polluted is the measure of damages; such damages being recoverable as will compensate for the injury actually sustained.[186] It is further held in that State that, in an action by a riparian owner against a manufacturing company for damages for the pollution of a stream, the court was not restricted to the mere depreciation of property in ascertaining the damages, but might take into consideration the inconvenience and discomfort to plaintiffs and their families caused thereby.[187] In Iowa the measure of damages flowing from a continuing nuisance is not the depreciation of the market value of the land, for it may be abated some time, but ordinarily the loss in its use caused thereby, and such special damages as may result therefrom, and where pasturage with the water of a creek befouled by sewerage is worthless, so that its rental value is lost, and cattle did not gain in weight when put into the pasture, such evidence is rightly received as tending to support a claim of loss in value of the use of the land, but such loss and loss in weight of cattle cannot both be allowed, as it would be awarding double damages, and plaintiff should therefore choose on which theory damages will be claimed.[188] Again, damages for a continuing nuisance may be shown subsequent to filing of the original petition, where there is an amendment filed claiming damages to the time of trial.[189] And in an action for damages and to abate a nuisance consisting of the discharge on plaintiff's land of refuse from a creamery, the damages are not limited to the damages to the land or its rental value, since a nuisance may cause special damages to a private person not susceptible of direct proof.[190] So, where the discharge of refuse from a creamery onto plaintiff's land caused a mud hole, which was fenced by plaintiff to keep his stock away from it, and the

186. West Muncie Strawboard Co. v. Slack (Ind., 1904), 72 N. E. 879.

187. Weston Paper Co. v. Pope, 155 Ind. 395, 56 L. R. A. 899, 57 N. E. 719.

188. Vogt v. City of Grinnell 123 Iowa, 332, 98 N. W. 782. See Bennett v. City of Marion, 119 Iowa, 473, 93 N. W. 558; Hollenbeck v. City of Marion, 116 Iowa, 69, 89 N. W. 210.

189. Bowman v. Humphrey, 124 Iowa, 744, 100 N. W. 854.

190. Van Lossen v. Clark, 113 Iowa, 86, 52 L. R. A. 279, 84 N. W. 989.

smell from the refuse extended several hundred feet, and the rental value of the land was decreased thereby, special damages were sufficiently shown to sustain a judgment for the damages and an abatement of the nuisance.[191] In another case in the same State it is held that the jury was properly instructed that it should not consider any damages accruing more than five years prior to the beginning of the action, and that the measure of damages was the difference between the value of the land, including crops, etc., before and after each flooding; but that the plaintiff could not recover for crops planted by him when he knew they would be flooded and destroyed, although, even then, they should consider the rental value of the land flooded and the permanent injury thereto.[192] Again, where the upper owner, by the unreasonable use of a stream, pollutes it, so that the water, as it flows upon the farm below, is not only useless for stock and domestic purposes, but also is a source of sickness, pain and discomfort to the lower owner and his family, he is entitled to recover not only the difference in the rental value of the farm on account of the nuisance, but also such special damages as he may have suffered, including that resulting from sickness, pain and discomfort.[193] In Maryland, damages arising subsequent to the action may be considered when they are the natural and necessary result of the act complained of.[194] Under a Missouri case, in assessing damages for a nuisance arising from the discharge of sewage by a city into a stream of water, and the principal claim is a serious injury to plaintiff's health, the jury must base their estimate of damages upon the evidence, but much must be left to their discretion because of the great difficulty, if not impossibility, of proving the exact amount of damages sustained in such a case.[195] In Montana, where the injury to land is permanent and its value absolutely destroyed for agricultural

191. Van Lossen v. Clark, 113 Iowa, 86, 52 L. R. A. 279, 84 N. W. 989.

192. Willitts v. Chicago, Burlington & Kansas City R. Co., 88 Iowa, 282, 21 L. R. A. 608, 55 N. W. 313.

193. Ferguson v. The Firmenich Mfg. Co., 77 Iowa, 576, 42 N. W. 448, 14 Am. St. Rep. 319.

194. Mayor & Councilmen of Frostburg v. Duffy, 70 Md. 47, 16 Atl. 642. See Hayden v. Albee, 20 Minn. 159 Gil. 143.

195. City of Kewanee v. Guilfoil, 81 Mo. App. 490.

purposes by fouling the waters of a stream and the deposit of refuse and poisonous matters on the surface, the rule of damages for such injury is the difference between the value of the land prior to the injury and its value after the injury. Generally the recovery of damages for a total and permanent injury to land includes all injuries, past, present and future. It practically amounts to an allowance to take the land upon which the nuisance has been committed for those purposes upon payment of a reasonable compensation therefor, and the amount fixed as damages by the jury and court will be treated as such reasonable compensation. But where the permanent and total injury to land for agricultural purposes does not immediately result from the nuisance itself, but several years elapse before such injury is completed, there may be a recovery of damages for the yearly injury to crops until the land is totally and permanently injured, and where that transpires, no damages can be allowed for injury to the crops ensuing thereafter. In order, however, to recover for injury to crops and permanent injury to the same land the complaint and proof should show distinctly and unequivocally the date when the permanent injury to the land took place, and the annual injury to crops prior to that date. If different portions of the land become permanently injured at different dates, such facts should also appear. But it is error to allow for injury to crops and permanent injury to the same land where such allowance would amount to double damages, and it cannot be ascertained from the complaint or evidence when such total and permanent injury was actually completed.[196] It is held in a New York case that the usuable value of the premises, as well as the value thereof without the claimed nuisance coupled with the value of improvements increasing the utility of the premises and enhancing their value, and also the probable and actual results as to malaria or other disorders or diseases may be shown where a stream flowing through plaintiff's land is polluted by the discharge of sewage creating an alleged nuisance and an action to abate the same and for damages is brought.[197] Under a North Carolina decision

196. Watson v. Colusa-Parrot Mining & Smelting Co. (Mont., 1905), 79 Pac. 14.

197. Wing v. City of Rochester, 9 N. Y. St. R. 473.

if a mill dam is erected and causes land to be overflowed the action may be continued from time to time, every continuance thereafter being considered as a new erection. It is not proper, however, in the first trial to give exemplary damages, but such only as will compensate for actual loss. But where the abating the nuisance will restore the lands to the same value and use as before the nuisance, and no real loss has been as yet sustained, the damages should be small, but if the unisance should thereafter be continued and a new action brought the damages should be exemplary, so as to compel an abatement of the nuisance.[198] Under a Pennsylvania decision the damages are the actual value of the property injured by pollution of a stream where such value is in excess of the cost of clearing the polluted stream, otherwise such cost of clearing will be allowed as damages; and where the right to the use of a watercourse is in a person the damages for its pollution cannot be reduced by a defense that a water supply sufficient for such persons' purposes could be supplied by a water company.[199] And in another case in that State it is decided that where it becomes necessary on impairment of the water power of a mill and the pollution of the waters of a creek above the same the damages on injunction may include the additional expense of steam necessary to run the mill in consequence of the acts of defendant. Also, the cost of cleaning out the mill race and dam.[200] In Tennessee the pollution of water having ceased damages should only be recovered for the injury while it lasted, and from the deposit until such time as it should be washed away.[201] The evidence as to damages should support the allegations as to rental value.[202] And if injury and damages are clearly shown as in case of overflow of lands, a finding of nominal damages only, is against evidence.[203] But where there is no evidence as to

198. Carruthers v. Tillman, 2 N. C. (1 Hayw.) 576.

199. Stevenson v. Ebervale Coal Co., 201 Pa. St. 112, 50 Atl. 818.

200. Keppel v. Lelingle Coal & Nav. Co., 200 Pa. St. 649, 50 Atl. 302.

201. Tennessee Coal, Iron & Rd. Co. v. Hamilton, 100 Tenn. 252, 46 Am. St. Rep. 48, 14 So. 167 (action on the case for damages).

202. Adams v. City of Modesto, 131 Cal. 501, 63 Pac. 1083, 61 Pac. 957.

203. Learned v. Castle, 78 Cal. 454, 21 Pac. 11, 18 Pac. 472.

the extent of the damages occasioned by the pollution of water of a stream by factory refuse matter, and it does not appear that serious results followed the creation of a nuisance, nominal damages only can be recovered.[204] So, in an action on the case for a nuisance in overflowing plaintiff's lands by erecting a mill dam, and the evidence showed that the land which was overflowed was low land usually overflowed at high water, nominal damages only were awarded.[205] If the nuisance consists in a discharge of sewage over private lands and at the time of trial it has been so far abated that no considerable annoyance is suffered by plaintiff or his family these facts will be considered in determining whether the damages are excessive.[206] Again, evidence as to the cultivation of crops prior to the time for which the plaintiff was entitled to recover, and of the effect of the water thereon, is held admissible as tending to show the effect of the water upon the land within the time for which a recovery could be had, the jury being instructed that it could not be considered for any other purpose.[207] Evidence is also relevant upon the question of damages to show what it would cost to remove offensive deposits cast upon plaintiff's land.[208] Damages for a nuisance should not, however, be conjectural, and this rule applies to an estimation based on possible sales of land alleged to have been prevented by the nuisance where there is nothing to show that the land could have been sold at the conjectural price or even at reduced rates.[209]

204. Perry v. Howe Co-operative Creamery Co., 125 Iowa, 415, 101 N. W. 150.

205. Carruthers v. Tillman, 2 N. C. (1 Hayw.) 576.

206. City of Jacksonville v. Lambert, 62 Ill. 519.

207. Willitts v. Chicago, Burlington & Kansas City R. Co., 88 Iowa, 282, 21 L. R. A. 608, 55 N. W. 313.

208. Watson v. New Milford, 72 Conn. 561, 45 Atl. 167, 77 Am. St. Rep. 345. See Stevenson v. Ebervale Coal Co., 201 Pa. St. 112, 50 Atl. 818.

209. City of Jacksonville v. Lambert, 62 Ill. 519. See, also, Stevenson v. Ebervale Coal Co., 201 Pa. St. 112, 50 Atl. 818.

Appendix A. *The questions of the bill of rights in connection with riparian rights; interference therewith by a city for sewage purposes; use of water as property and compensation; of nuisance and of damages,* are fully discussed in a case decided in 1901 by the Supreme Court of Ohio, City of Mansfield v. Balliett, 65 Ohio St. 451, 63 N. E. 86, 58 L. R. A. 628, and the court, per Williams, J., says: "The plaintiff sued for alleged violations, by the defend-

ant, of his rights as a riparian proprietor. He is the owner of two valuable farms, by or through which runs a small natural water course, known as the Rocky Fork of the Mohican river. Both of the farms are naturally adapted to and have been used for agricultural and grazing purposes. Each farm is improved, and each one has on it a dwelling house, barn and other suitable buildings. One of them known in the case as the 'home farm,' is occupied by the plaintiff as his family residence, and had been for many years before the alleged encroachments on his rights by the defendant. The other he rents to tenants who occupy and cultivate it. The waters of this natural stream were accustomed to flow by and through these farms, supplying them, and their occupants, with pure and wholesome water in sufficient quantities for all domestic, agricultural, and other suitable purposes for which pure and wholesome water is generally used and needed upon a farm, until they were polluted and corrupted by the alleged acts of the defendant. The wrong complained of is, that the defendant, a city of something over eighteen thousand inhabitants, and situated on or near the water course above the plaintiff's farms, by a system of sewerage emptying into the stream, caused to be collected and discharged into the stream, the sewage of the city, or a large part of it, which was carried down the stream to the plaintiff's farm, where it accumulated and remained in large quantities. As a result of this alleged wrong of the defendant, the water was polluted, and rendered unfit for domestic and other ordinary uses; and, in time of freshets, the filth was washed out by the force of the stream and deposited on the plaintiff's lands, destroying the grass and herbage, and causing offensive and unwholesome smells which materially interferred with the comfortable and proper enjoyment of the premises by the plaintiff and his family. The suit was defended chiefly on the ground that the stream was corrupted, in part at least, by other independent sources over which defendant had no control; though the contention most relied on in argument here is that the city cannot be held liable for the acts complained of in any event. In the court's instructions to the jury the defendant's liability was confined to such substantial injury as the plaintiff actually sustained in consequence of the alleged misconduct of the defendant, and his measure of recovery, if the issues were found in his favor, was limited to such an amount as would reasonably compensate him for the material interference with the comfortable enjoyment of his home farm, the proper and necessary use of the water to which he had hitherto been accustomed, including any additional expense rendered necessary in watering his stock, and the loss of his grass and herbage. His damages to the rented farm, the jury were instructed, could not exceed the actual loss resulting from a diminution in the rents. The charge given covered, substantially, all of the instructions requested by the defendant, except, probably, the second one, which reads as follows: 'The right of plaintiff to have the water descend on him in its pristine clearness must yield to the demands of a denser population and the march of civilization.'

"So that it must be accepted as established by the verdict and judgments below, that the injury of which the plaintiff complains was caused by the defandant, as claimed, and that, in consequence thereof he sustained substantial damage of the special nature and degree which would enable him to maintain action therefor if inflicted by an individual or private corporation. And he is not without like remedy against the defendant, unless, as claimed by its counsel, it has a paramount right, either by legislative grant, or from necessity for the preservation of the public health, safety, and welfare, to subject the water course to the uses it has made of it, without accountability for the destruction or material impairment of the property rights of lower riparian owners.

"The statutory authority for this immunity, it is contended by counsel, is found in sections 2,232 and 2,370 of the Revised Statutes. The former section provides that a city may enter upon and hold real estate without its corporate limits, among other enumerated purposes, 'for sewers, drains, and ditches, and for this purpose the corporation shall have power to appropriate, enter upon and take private property, lying outside the corporate limits.' The latter section authorizes municipal corporations to adopt a system of sewerage 'the main or principal sewers having their outlet in a river or other proper place.' The lawful exercise of the power conferred on municipal corporations to enter upon and take private property for any of the purposes enumerated by the former section requires a legal appropriation, as that section indicates, involving the assessment of compensation for he property when taken without the owner's consent. The stream in question in this case is not a river, a term that may import a stream of sufficient volume and flow to carry off sewage emptied into it, and thus preserve the purity of its water; nor, as will be hereafter noticed, can that be a suitable place for the deposit of sewage, within the contemplation of the law, where that will result in the creation of a public or private nuisance. But the right of the plaintiff to redress for the injury done him lies back of any mere authorization by the statute of the defendant's acts which inflicted the injury, and rests upon the constitutional guaranty which secures the inviolability of private property, and the right of the owner to compensation when taken for any public use. Indeed, it appears to be a settled principle of universal law, independent of constitutional provision, that the right to compensation for private property when taken for a public use, is an inseparable incident of the ownership of property. It is declared in Pumpelly v. Green Bay Co., 80 U. S. (13 Wall.) 166, that 'By the general law of European nations and the common law of England it was a qualification of the right of eminent domain that compensation should be made for private property taken or sacrificed for public use. And the constitutional provisions of the United States and of the several States which declare that private property shall not be taken for public use without just compensation were intended to establish this principle beyond legislative control.' And it was there held that: 'It is not necessary that property should be absolutely

taken, in the narrowest sense of that word, to bring the case within the protection of this constitutional provision. There may be such serious interruption to the common and necessary use of property as will be equivalent to a taking, within the meaning of the constitution. The backing of water so as to overflow the lands of an individual or any other superinduced addition of water, earth, sand, or other material or artificial structure placed on land, if done under statutes authorizing it for the public benefit, is such a taking as by the constitutional provision demands compensation.'

"In that case a statute of Wisconsin authorized the construction of a dam across Fox River, in order to improve its navigation. The dam, which was constructed in accordance with the provisions of the statute, caused the water to overflow the plaintiff's lands on account of which he suffered substantial injury, for which he brought suit. It was claimed by the defendant that the damages sustained by the plaintiff were 'such as the State had a right to inflict in improving the navigation of Fox River, without making any compensation for them.' Mr. Justice Miller, in resolving this contention against the defendant, said: 'The argument of the defendant is that there is no taking of the land within the meaning of the constitutional provision, and that the damage is the consequential result of such use of a navigable stream as the government had a right to for the improvement of its navigation.

" 'It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because in the narrowest sense of that word, it is not taken for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the government, and make it an authority, for invasion of private right under pretext of public good, which had no warrant in the laws or practices of our ancestors.'

"And the learned justice, referring to the case of Gardner v. Newburgh, 2 Johns Ch. (N. Y.) 162, obserbed that: 'In the case of Gardner v. Newburgh, Chancellor Kent granted an injunction to prevent the trustees of Newburgh from diverting the water of a certain stream flowing over plaintiff's land from its usual course, because the act of the legislature which authorized it had made no provision for compensating the plaintiff for the injury thus done to his land. And he did this, though there was no provision in the constitution of New York such as we have mentioned, and though he recognized that the water was taken for a public use. After

citing several continental jurists on this right of eminent domain, he says that while they admit that private property may be taken for public uses when public necessity or utility requires, they all lay it down as a clear principle of natural equity that the individual whose property is thus sacrificed must be indemnified. And he adds that the principle and practice of the English government are equally explicit on this point. It will be seen in this case that it was the diversion of the water from the plaintiff's land, which was considered as taking private property for public use, but which, under the argument of defendant's counsel would, like overflowing the land, be called only a consequential injury.'

"And Mr. Justice Miller concludes that: 'If these be correct statements of the limitations upon the exercise of the right of eminent domain, as the doctrine was understood before it had the benefit of constitutional sanction, by the construction now sought to be placed upon the constitution it would become an instrument of oppression rather than protection to individual rights. But there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be, in the language of Mr. Angell, in his work on water courses, equivalent to the taking of it, and that under the constitutional provisions it is not necessary that the land should be absolutely taken.'

"Authors, who have fully investigated the subject, are quite agreed in their conclusions, that riparian rights are property rights, and therefore property, in the legal signification of the term, and within the meaning of the constitution. In Lewis on Eminent Domain, Vol. 1, Section 60, that author says that: 'All the authorities agree' that small streams incapable of navigation 'are wholly private property, and that the title of the riparian owner extends to the middle of the stream.' And in Section 61 it is said that: 'It may be well laid down as a well settled principle that every proprietor over or past whose land a stream of water flows has a right that it shall continue to flow to and from his premises in quantity, quality, and manner in which it is accustomed to flow by nature, subject to the right of the upper proprietors to make a reasonable use of the stream as it flows past their land. This right is a part of his property in the land, and in many cases constitutes its most valuable element. It necessarily follows, therefore, that any violation of this right in the exercise of the power of eminent domain is a taking of private property for which compensation must be made.' In Section 62 the rule is stated as follows: 'Where the water of a stream or any part thereof are taken or diverted to supply a city or village with water, or for the use of a canal or railroad company, or to, improve a highway by land, or to make a new channel either for the improvement of navigation, or for the protection of a public road, or for any other public use, compensation must be made to the inferior proprietors on the banks of the stream who are injured thereby. The only dissenting case which has come to our notice is that of the Commissioners of Homochitto River v. Withers, in which the Supreme Court of Mississippi held

that it was not a taking, to divert a stream of water from the plaintiff's property to a new channel for the purpose of improving navigation. This decision is so palpably wrong that we do not think it requires discussion.'

"'According to principles heretofore laid down,' says the same author, in Section 84, 'It follows that an injury to riparian rights for public use is a taking for which compensation must be made. These riparian rights founded on the common law, are property, and are valuable, and while they must be enjoyed in due subjection to the rights of the public, they cannot be abridged or capriciously destroyed or impaired. They are the rights, of which, when once vested the owner can only be deprived in accordance with the law of the land, and, if necessary that they be taken for public use, upon due compensation.'

"In Mills on Eminent Domain, where the same doctrine is maintained, it is said, Section 79, that: 'Riparian rights are property. Of this property the owner cannot be deprived without just compensation, nor can the state itself exercise such a power of deprivation or confer it upon some subordinate municipality, without making compensation for the property taken.' And in Section 182 of the same work, it is laid down as settled law, that: 'The legislative authority to do an act resulting in damages to the property of an individual cannot be sustained, without the payment of damages, on the simple claim that the legislature cannot authorize that which is improper. It is beyond the power of the legislature to authorize the infliction of an injury without compensation. Charters should not be construed as evincing any legislative intention to authorize an injury, or to shield the corporation from a common law action, in case compensation is not provided. The fact that compensation is not provided should not lead the court to suppose that all injuries not provided for were declared by the legislature to be consequential, and, therefore, not subject to compensation.'

"In Gould on Waters, Section 204, after declaring the right of riparian proprietors to have the stream 'flow as it is wont by nature, without material diminution or alteration,' it is maintained that: 'They may insist that their rights to thus use the water shall be regarded and protected as property. The right to use the water in its natural flow is not a mere easement or appurtenance, but is inseparably annexed to the soil itself. It does not depend upon appropriation or presumed grant from long acquiescence on the part of other riparian proprietors above and below, but exists jure nature as parcel of the land.'

"Wood on Nuisances, Section 332, speaking of the property rights of riparian owners, says, that they are rights 'in the owner of the soil which cannot be violated with impunity; rights which are distinct from those enjoyed by the public generally, and which exist not because of any special property in the water, but because of the ownership of the land over or through which it flows, and the rights which are necessarily created thereby.' These property rights, it is said in the next section, 'may be the subject of sale or lease like the land itself.' And in section 427, speaking more directly to the question involved in this case, the author says: 'The

pollution of water by artificial drainage which causes sewage to flow into a stream, spring or well, whether done by a municipal corporation or an individual, constitutes a nuisance which entitles the owner to damages therefor, the rule being that municipal corporation has no more right to injure the waters of a stream or the premises of an individual than a natural person.'

"This subject is discussed in Angell on Water Courses, where the doctrine announced in the quotations already made from other standard authors is fully upheld. In Sections 457, 458, that author says: 'Among the variety of legal titles which, in this country, have often been involved in controversies respecting the rights of riparian proprietors on inland streams and rivers, is the important one entitled "eminent domain," or the right which the government retains over the estates of individuals to appropriate them to public use. It is obvious, that the government of no state can administer its public affairs in the most beneficial manner to the community at large, if it cannot, on particular emergencies and for public utility, exercise at least a qualified power of disposing of, or of impairing in value, the property of an individual citizen. To this power, according to Vattel "men have impliedly yielded, though it has not been expressly reserved." But it is a rule founded in equity, and is laid down by jurists as an acknowledged principle of universal law, that a provision for compensation is a necessary attendant on the due exercise of the power of the lawgiver to deprive an individual of his property without his consent.' Section 458: 'In England, notwithstanding the transcendant power of its parliament, the law on this subject has been administered on the above just and equitable principles. In the familiar instance of an act of parliament, for promoting some specific object or undertaking of a public nature as a turnpike, navigation, canal, or railway, the legislature scruple to interfere with private property and compel the owner of the land to alienate it, without providing a reasonable price and compensation for so doing. "If a new road," says Blackstone, "were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights, as modeled by the municipal law. In this, and in similar cases, the legislature alone, can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is considered as an individual, treating with an individual for exchange. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price; and

even this is an extension of power which the legislature indulges with caution."

"It would not be a profitable extension of this opinion to quote from the numerous cases cited in the text books already extensively quoted to sustain the text. The substance of the many learned opinions of able courts is given in the quotations already made. We will add to them only a brief extract from the able opinion of Ruger, C. J., in Seifert v. City of Brooklyn, 101 N. Y. 136, 144: 'It is a principle of the fundamental law of the state,' says this learned judge, 'that the property of individuals cannot be taken for public use except upon the condition that just compensation be made therefor, and any statute conferring power upon a municipal body, the exercise of which results in the appropriation, destruction, or physical injury of private property by such body, is inoperative and ineffectual to protect it from liability for the resultant damages, unless some adequate provision is contained in the statute, for making such compensation. The immunity which extends to the consequences, following the exercise of judicial or discretionary power, by a municipal body or other functionary, presupposes that such consequences are lawful in their character, and that the act performed might in some manner be lawfully authorized. When such power can be exercised so as not to create a nuisance, and does not require the appropriation of private property, to effectuate it, the power to make such an appropriation or create such nuisance will not be inferred from the grant. Where, however, the acts done are of such a nature as to constitute a positive invasion of the individual rights guaranteed by the constitution, legislative sanction is ineffectual as a protection to the persons or corporation performing such acts from responsibility for their consequences. Radcliff's Exrs. v. Mayor, 5 N. Y. 195. It has been sometimes suggested that the principle illustrated in the maxim, "*salis populi est suprema lex*," may be applied to and will shield the perpetrators, from liability for damages arising through the exercise of such power, by a municipal corporation, but we apprehend that this maxim cannot be thus invoked. Wilson v. Mayor, 1 Denio, 595. The case where such a doctrine can be properly applied must, from the very nature of the principle, be confined to circumstances of sudden emergency, threatening disaster, public calamity and precluding a resort to remedies requiring time and deliberation. Wharton on Leg. Max, 89; Mayor v. Lord, 17 Wend, 285. It is suggested (in the latter case) that even in such an event under the principles of the constitution, the public would be liable for the damages inflicted. However this may be, we are quite clear that the theory that a municipal corporation has the right in prosecuting a scheme of improvements, to appropriate without compensation, either designedly or inadvertantly, the permanent or occasional occupation of a citizen's property, even though for the public benefit, cannot be supported upon the principle referred to. If the use of such property is required for public purposes, the constitution points out the way in which it may be acquired, when there is no such imminence in the

danger apprehended as precludes a resort to the remedy provided, and the only mode by which it can be lawfully taken in such cases, is that afforded by the excuse of the right of eminent domain."

"There appears to be no diversity of opinion upon the proposition that riparian rights are property that may be the subject of bargain and sale, either with or separate from the land; that these rights constitute a part of the owner's estate in the land, and materially enter into the actual value; and that any injurious invasion, or impairment of those rights amounts to a taking of the owner's property. It follows that no legislative sanction can justify the taking of such property, either directly or indirectly, though it be required for a public use, without adequate provision for a just indemnity to the owner. To entitle the owner to such indemnity, it is not necessary that his entire interest in the particular property be taken. The value of property consists in the owner's absolute right of dominion, use, and disposition for every lawful purpose. This necessarily excludes the power of others from exercising any dominion, use or disposition over it. Hence, any physical interference by another, with the owner's use and enjoyment of his property, is a taking to that extent. To deprive him of any valuable use of his land is to deprive him of his land, protanto. So that, the principle of the constitution is as applicable where the owner is partially deprived of the uses of his land, as where he is wholly deprived of it. Taking a part is as much forbidden by the constitution as taking the whole. This principle has been maintained by the former decisions of this court. In Reeves v. Treasurer, 8 Ohio St. 333, 346, where the use sought was for draining purposes, this court said: 'The land occupied by the ditch and its banks is not, it is true, wholly appropriated. The owner may still use the ditch itself for purposes of irrigation, for watering stock, or may perhaps make it serve the purpose of a fence. He may grow timber and shrubbery on its banks. But his dominion over it —his power of choice as to the uses to which he will devote it, are materially limited; in short, other parties acquire a permanent easement in it. An easement is property; and to the extent of such easement, it is clear to us that private property is taken, within the meaning and spirit of the constitutional prohibition. The decisions in other states, on questions bearing on this point, seem not to have been uniform. Sedgwick on Const. Law, 519 et seq. But the doctrine here maintained is settled, in Ohio, by repeated adjudications, and on principles which, we think, cannot be shaken. Crawford v. Delaware, 7 Ohio St. 459. And see Railroad Co. v. Commissioners, 63 Ohio St. 23.'"

"There is a line of authorities which sustain the right of action in cases like the one before us, and place it upon the ground that such acts as those complained of here constitute a nuisance, which municipal corporations cannot, any more than individuals, be allowed to create or maintain. To this proposition, Judge Dillon, in his work on Municipal Corporations, Section 1,047, adds the weight of his great authority: 'It is perhaps impossible to reconcile all of the cases on this subject, and courts of the highest respectability have held that

if the sewer, whatever its plan, is so constructed by the municipal authorities as to cause a positive and direct invasion of the plaintiff's private property, as by collecting and throwing upon it, to his damage, water or sewage which would not otherwise have flowed its way there, the corporation is liable. This exception to the general doctrine, when properly limited and applied, seems to be founded on sound principles, and will have a salutary effect in inducing care on the part of the municipality to prevent such injuries to private property, and will operate justly in giving redress to the sufferer if such injuries are inflicted. Accordingly though a municipality having the power to construct drains and sewers may lawfully cause them to be built so as to discharge their refuse matter into the sea, or natural stream of water, yet this right must be so exercised as not to create a nuisance, public or private. If a public nuisance is created, the public has a remedy by a public prosecution; and any individual who suffers special injury therefrom may recover therefor in a civil action. If, therefore, deposits from sewers constructed by a city cause a peculiar injury to the owner of a wharf or dock, by preventing or materially interfering with the approach of vessels and the accustomed and lawful use of the wharf or dock, the city is liable to the latter in damages.'"

"In Wood on Nuisances, Section 427, the rule is stated as follows: 'The pollution of water by artificial drainage which causes sewage to flow into a stream, spring or well, whether done by a municipal corporation or an individual, constitutes a nuisance which entitles the owner to damages therefor, the rule being that a municipal corporation has no more right to injure the waters of a stream or the premises of an individual than a natural person. . . . The pollution of water by discharging waste from mills and manufactories, or, indeed, in any way, creates an actionable nuisance, and the legislature has no power to authorize the pollution of the water of a stream without compensation to the owners of the land through which such stream flows, as such use is a taking of property within the meaning of the constitution. It has been held in numerous cases that a municipal corporation is liable for the wrongful diversion of surface water from its natural channel to the premises of another, as well as for discharging its drainage or sewage upon private property.'

"Other commentators of acknowledged authority maintain the same rule. A few only, of the many reported cases which sustain this doctrine, will be noticed. The case of Chapman v. City of Rochester, 110 N. Y. 273. It is not substantially different from the one before us. There 'plaintiff owned and occupied certain premises, across which ran a stream fed by springs of pure water. He collected the water of said stream into an artificial basin and used it for domestic purposes and the propagation of fish, and in winter procured from it a supply of ice. Defendant thereafter constructed sewers, through which, not only surface water, but the sewage from houses and water closets were discharged into said stream above plaintiff's land, rendering its water unfit for use and covering its

banks with filthy and unwholesome sediment. Held, that these acts constituted a nuisance to restrain which, as well as to recover his personal damages, plaintiff could maintain an action.' Morgan v. City of Danbury, 67 Conn. 484, is much like the preceding case. There 'the plaintiff, a riparian mill proprietor, alleged that the defendant, without making him any compensation or attempting to acquire any of his rights, was discharging and threatening to continue to discharge in still greater quantity, waste matter, sewage, and other noxious, corrupt substances from its sewers into the stream so as to pollute it and seriously damage his land and mill privilege; that such discharge poisoned and corrupted the air of the neighborhood and endangered the health of the plaintiff, his workmen and others, and had already partly filled his dam with filth and prevented him from disposing of his land for building purposes; and prayed for an injunction against the continuance of the nuisance and to restrain the pollution of the waters of the stream. The trial court found these allegations to be true, that the plaintiff's injuries could not be adequately compensated in damages, and that the acts complained of constituted a public nuisance, and granted an injunction restraining the defendant, after twenty months after the date of the decree, from discharging any sewage into the stream above the plaintiff's premises, and from polluting the waters by any such discharge.' And it was there held 'that the right to deposit a thing in any place must always be dependent not only on the nature of the thing deposited, but on the nature of the place in question and the uses to which that has already been put; and that if the stream was from whatever cause, in such a condition that the defendant's discharge of sewage there worked a nuisance, it had no right to use the stream for such purpose.' And see Seifert v. City of Brooklyn, *supra;* City of Jacksonville v. Doan, 145 Ill. 23; Inman v. Tripp, Treas. 11 R. I. 520; Good v. Altoona, 162 Pa. St. 493; Owens v. Lancaster, 182 Pa. St. 257; Mason v. City of Mattoon, 95 Ill. App. 525. The right of the plaintiff to the relief awarded him by the judgments of the lower courts, is sustained by the case of Rhodes v. City of Cleveland, 10 Ohio, 160. That suit was brought against the city to recover damages for so cutting its drains as to cause the water to overflow and wash away the plaintiff's lands. The trial court charged the jury that the plaintiff could not recover, 'unless he showed either that the city acted illegally, or if within the scope of authority, that they acted maliciously.' In reversing the judgment founded on the verdict for the defendant, this court held that: 'Corporations are liable like individuals for injuries done, although the act was not beyond their lawful powers.' The grounds of the decision are stated in the opinion by Lane, C. J., as follows: 'That the rights of one should be so used as not to impair the rights of another, is a principle of morals, which, from very remote ages, has been recognized as a maxim of law. If an individual, exercising his lawful powers commit an injury, the action on the case is the familiar remedy; if a corporation, acting within the scope of its authority, should work wrong to an-

other, the same principle of ethics demands of them to repair it, and no reason occurs to the court why the same remedy should not be applied to compel justice from them.'

"That decision is founded upon the broad principles of common justice and constitutional right. It is applicable to, and decisive of this case. No argument can be required to prove that, if the plaintiff's riparian rights are property for which, when injured by an individual the latter may not be held liable therefor in an action, they are none the less property when so injured or taken by the public; nor that those acts which, when done by an individual constitute a deprivation of the owner of his property, are equally so when done for the benefit of an aggregation of individuals that go to make up the population of a municipal corporation. Nor, can it add anything to the defendant's prerogatives, nor take anything from the plaintiff's rights, to call the injury he has suffered consequential. The owner is nevertheless deprived of substantial property interests, and by no name by which the acts that produce that effect may be called, can destroy or diminish his constitutional right to indemnity. The question whether the injury constitutes a taking of property, depends upon its effect on the owner's proprietary rights, and not upon the length of time necessary to produce that effect. They may be as effectually taken by continuing acts extending over a considerable period of time, as by a single act.

"The case of Rhodes v. Cleveland, *supra*, has been repeatedly approved and followed in subsequent decisions of this court. In McCombs v. Akron, 15 Ohio, 474, 479, Read, J., after stating that 'the sole question in this case is, whether a municipal corporation can be made liable for an injury resulting to the property of another, by an act of such corporation, strictly within the scope of its corporate authority, and unattended by any circumstances of negligence or malice,' with his usual clearness and force says: 'The case of Rhodes v. City of Cleveland, 10 Ohio, 159, with admirable good sense and strength of reason, answers this question, by asserting that corporations are liable, like individuals, for injuries, although the act was not beyond their lawful powers. The late learned Ch. J. Lane, who pronounced the opinion of the court in that instance, accounts for the older cases, upon the ground that courts were hampered by the mystic notion attached to corporate seals, by which corporations withdrew themselves from responsibility, and cast it upon their agents. A sort of transcendentalism which enveloped both the courts and the profession in a mist growing out of the airy nothingness of the subject matter, enabling corporations, like the pestilence which walketh unseen, to do their mischief and escape their responsibility. It is refreshing to the jurist, and important to the rights of individuals, that these confused notions are yielding to a clearer light and more solid reason.' The learned judge further said: 'We recognize the doctrine of that case, as laid down by this court, as founded in the most solid reason, right and morals, and a majority of the court have not the slightest disposition to impair its obligation, but, by the light of such example and assurance, hope that the whole subject matter of cor-

porations will in the end be reduced to the control of incontestible principle.' In Dayton v. Pease, 4 Ohio St. 80, 94, speaking of both of the above cases, the liability of a municipal corporation, acting through subordinate agents, within the scope of its authority, and without malice or negligence, was enforced, where the acts of such agents resulted in injury to the property of private individuals. The propriety of investing such corporations with the power to improve their streets, resulting often in indirect injury to private property, is conceded, but the cases rest upon the clear principle of right and justice, which requires compensation to go hand and hand with public benefit. And, when in the lawful exercise of these powers, private property must be injured for the common benefit of all, all should be held liable to make reparation; and, in the view of the judges who concurred in these decisions, the principle was not without support from that section of the constitution of the state, which secures the inviolability of private property.' The court, in Cohen v. Cleveland, 43 Ohio St. 190, 193, is not less emphatic in its approval of the doctrine of Rhodes v. Cleveland, *supra*. And see Youngstown v. Moore, 30 Ohio St. 133, 142, 143. It is true that the decision of Rhodes v. Cleveland, is not put precisely on constitutional ground, though that ground is advanced in subsequent cases approving the decision.

"We are satisfied, after the most careful consideration we have been able to give this case, that the judgments below are correct, and they are affirmed. Marshall, C. J., and Burkett, J., concur." City of Mansfield v. Balliett, 65 Ohio St. 451, 479, 63 N. E. 86.

CHAPTER XV.

Municipal Powers and Liabilities.

Section 330. Municipal powers generally.
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§ 330. **Municipal powers generally.**[1]—A municipality can only exercise such powers as have been conferred upon it by the legislature. Its powers are derived from this source and it is limited in the exercise of any power to such as has been clearly delegated to it either by the act creating it or by special acts or to a power which arises by necessary implication out of some delegated power.[2] And the power and jurisdiction of a municipal corporation are confined to its own limits and to its own internal concerns and its by-laws are binding upon none but its own members and those who are properly within its jurisdiction.[3] A city ordinance, however, which prohibits the creation or maintenance of a nuisance and makes it a misdemeanor to maintain one is held not to be invalid or unconstitutional because the general statutes of the State provide for the conviction or punishment of those guilty of a like offense.[4]

1. Municipal powers as to particular nuisances and ordinances in the exercise of such powers have been treated in various parts of this work to which reference is made. As to nuisances legalized by municipality see §§ 78-80 herein. At to power of legislature to delegate authority to municipality to declare nuisances see § 84 herein. As to ordinances as to smoke see §§ 150-154 herein. As to liability of municipal corporations for smells creating a nuisance see § 169 herein. As to ordinances relating to animals see §§ 197-199 herein. As to ordinance relating to stables or cattle enclosures see § 210 herein. As to power of municipality to authorize obstructions in highway see §§ 210, 211 herein. As to power of municipality to declare things in highway a nuisance see §§ 212, 213 herein. As to municipal liability for nuisances in highway see § 214 herein.

2. Exp. Burnett, 30 Ala. 461; Waters v. Leech, 3 Ark. 110; Pratt v. Litchfield, 62 Conn. 112; Knoxville v. Chicago, B. & Q. R. Co., 83 Iowa, 636, 50 N. W. 61; City of Keokuk v. Scroggs, 39 Iowa, 447; Clark v. Des Moines, 19 Iowa, 202, 87 Am. Dec. 423; Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694; Pine City v. Munch, 42 Minn. 342, 6 L. R. A. 763, 44 N. W. 197; St. Charles v. Nolle, 51 Mo. 122, 11 Am. Rep. 440; Lawton v. Steele, 119 N. Y. 226, 23 N. E. 878, 7 L. R. A. 134; Troy v. Winters, 4 Thomp. & C. (N. Y.) 256. See §§ 78-80, herein.

A corporation can exercise no powers not clearly delegated in the act of incorporation or arising by necessary implication out of some delegated powers. Miller v. Burch, 32 Tex. 208, 5 Am. Rep. 242.

3. Gass v. Greeneville, 4 Sneed (Tenn.), 61.

4. People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; People v. Hanrahan, 75 Mich. 611.

§ 331. **Boards of health.**—Powers such as are ordinarily possessed by municipalities as to nuisances endangering public health or safety are in many cases, either by virtue or powers conferred upon the municipality or by virtue of some express statute, vested in local boards of health, which may generally act the same as the municipality would in such cases subject to such limitations as may be imposed by the municipal or statutory power creating them. They are generally authorized to regulate in a reasonable manner such matters as affect the public health or safety, or to remove or abate nuisances affecting or endangering the same. They are also in many cases vested with powers in regard to special matters As a general rule the same general principles control in determining the validity of their acts as control in the case of the exercise of similar powers by the municipality, though in each case, resort must be had to the particular laws by which they are created and under which they receive their authority.[5]

5. See, as to the source and extent of and the manner in which they may exercise their powers, Parker & Worthington on Public Health and Safety, §§ 70-176.

As to powers of board of health see Gaines v. Waters, 64 Ark. 609, 44 S. W. 353; Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3; Martin v. Board of Commissioners, 27 Ind. App. 98, 60 N. E. 998; Stowe v. Heath, 179 Mass. 385, 60 N. E. 975; Chase v. Middleton, 123 Mich. 647, 82 N. W. 612; State, State Bd. of Health v. Jersey City, 55 N. J. Eq. 116, 35 Atl. 835, aff'd in 55 N. J. Eq. 591, 39 Atl. 1114; North Brunswick Twp. Bd. of Health v. Lederer (N. J. Ch.), 29 Atl. 444; Hutton v. City of Camden, 39 N. J. L. 122, 23 Am. Rep. 203; State, Raritan Twp. Bd. of Health v. Henzler (N. J.), 41 Atl. 228; Cartwright v. Board of Health of Cohoes, 39 App. Div. (N. Y.) 69, 56 N. Y. Suppl. 731; Newtown v. Lyons, 11 App. Div. (N. Y.) 105, 42 N. Y. Suppl. 241; Rogers v. Barker, 31 Barb. (N. Y.) 447; Schoefflin v. Calkins, 5 Misc. R. (N. Y.) 159, 25 N. Y. Suppl. 696; Smith v. Baker, 3 Pa. Dist. R. 626, 14 Pa. Co. Ct. 65; Philadelphia v. Lyster, 3 Pa. Super. Ct. 475; Adams v. Ford, 3 Pa. Super. Ct. 239; Barnett v. Laskey, 68 L. J. Q. B. N. S. 55.

That which is not a nuisance in fact cannot be made a nuisance by a mere declaration of a board of health. People, Copcutt v. Yonkers Board of Health, 140 N. Y. 1, 35 N. E. 320, 55 N. Y. St. R. 416, 23 L. R. A. 481, 37 Am. St. R. 522, aff'g 71 Hun, 84, 54 N. Y. St. R. 317, 24 N. Y. Suppl. 629.

A city council may authorize the board of health to abate a nuisance endangering the public health where power is conferred by statute upon the municipality to cause nuisances to be abated within the jurisdiction of the board of health and to establish such a board with

§ 332. **Power of municipality to declare things nuisances.**— In the absence of power conferred by the legislature upon a municipality to define or declare what is a nuisance no power is held to be vested in it to declare a certain act or omission a public nuisance.[6] And though the power may be conferred upon a municipal corporation to declare, prevent and abate nuisances, yet this will not justify a wanton declaration that a particular act, thing or avocation is a nuisance which unquestionably is not one. The power must be exercised in a reasonable manner having in view the personal and property rights of the individual and the mere fact that a certain thing has been declared by the municipal authorities to be a nuisance does not

such power "as shall be necessary to secure the city and the inhabitants thereof from the evils of contagious, malignant and infectious diseases." Gaines v. Waters, 64 Ark. 609, 44 S. W. 353.

A license by the municipality to carry on a certain trade or business, has been held, in Massachusetts, not to affect the right of the board of health to prohibit by order the exercise of such trade at the place designated by the license. City of Cambridge v. Trelegan, 181 Mass. 565, 64 N. E. 204. Compare Nicoulin v. Lowery, 49 N. J. L. 391, 8 Atl. 513.

A notice to abate to the one maintaining a nuisance may be necessary and a prerequisite to a right by the board of health to abate. See Hall v. Staples, 166 Mass. 399, 44 N. E. 351; St. Louis v. Flynn, 128 Mo. 413, 31 S. W. 17; Hutton v. City of Camden, 39 N. J. L. 122, 23 Am. Rep. 203; Verder v. Ellsworth, 59 Vt. 354, 10 Atl. 89; Supervisors of River Thames v. Port Sanitary A. of London Port (1894), 1 Q. B. 647; Hopkins v. Southwick Local Board of Health, L. R. 24 Q. B. D. 712.

Effect of error of judgment by board of health. It is decided in Connecticut that where boards of health are vested by statute with "all the power necessary and proper for preserving the public health and preventing the spread of malignant diseases" and "to examine into all nuisances and sources of filth injurious to the public health and cause to be removed all filth found within the town which in their judgment shall endanger the health of the inhabitants" they are not liable, where they act in good faith and with proper care and prudence, for mere errors of judgment in causing the removal as a nuisance of property which they believed to be the cause of the prevalence of a malignant disease. Raymond v. Fish, 51 Conn. 80, 50 Am. Rep. 3.

6. St. Paul v. Gilfillan, 36 Minn. 298, 31 N. W. 49. See Cole v. Kegler, 64 Iowa, 59, 19 N. W. 843. As to power of legislature to declare things nuisances, see §§ 81-83, herein. As to delegation by legislature of such power to municipality, see § 84, herein.

render it one where it is not in its nature within the common law a statutory idea of a nuisance.[7]

§ 333. **Same subject continued.**—In this connection it has been said by the United States Supreme Court in reference to an ordinance declaring a certain structure a nuisance: "The mere declaration by the City Council of Milwaukee, that a certain

7. Ward v. City of Little Rock, 41 Ark. 526, 48 Am. Rep. 46; Des Plaines v. Poyer, 123 Ill. 348, 14 N. E. 677, 5 Am. St. R. 524; Hermon v. Chicago, 110 Ill. 400, 413, 51 Am. Rep. 698; Evansville v. Miller, 146 Ind. 613, 45 N. E. 1054, 38 L. R. A. 161; Cole v. Kegler, 64 Iowa, 59, 19 N. W. 843; Everett v. City of Council Bluffs, 46 Iowa, 66; Opelousas Bd. of Aldermen v. Norman, 51 La. Ann. 736, 25 So. 401; Waters Pierce Oil Co. v. New Iberia, 47 La. Ann. 863, 17 So. 343; Green v. Lake, 60 Miss. 451; Lake v. City of Aberdeen, 57 Miss. 260; St. Louis v. Edward Heitzeberg Packing & P. Co., 141 Mo. 375, 42 S. W. 954, 64 Am. St. R. 516, 39 L. R. A. 551; Kansas City v. McAleer, 31 Mo. App. 433; New Jersey R. & T. Co. v. Jersey City, 29 N. J. L. 170; Davis v. New York, 14 N. Y. 524, 67 Am. Dec. 186; Griffin v. City of Gloversville, 67 App. Div. (N. Y.) 403, 73 N. Y. Suppl. 684; Brooklyn City R. Co. v. Furey, 4 Abb. Pr. N. S. (N. Y.) 364; Pittsburg v. Keech & Co., 21 Pa. Super. Ct. 548, 554.

An ordinance must not impose unauthorized restrictions upon the right of the citizen to the use of his property. City of Newton v. Belger, 143 Mass. 598, 10 N. E. 464.

An injunction will not be granted to restrain the threatened violation of a city ordinance declaring a certain act a nuisance, where it is not in fact one. Warren v. Cavanagh, 33 Mo. App. 102; City of Manchester v. Smyth, 64 N. H. 380, 10 Atl. 700; Borough of Chambridge Springs v. Moses, 22 Pa. Co. Ct. R. 637. Examine Rand v. Wilber, 19 Ill. App. 395, holding that the erection of a privy in violation of a municipal ordinance would be enjoined.

An order of a city council which declares a certain structure to be a nuisance is not conclusive of the fact in an action against the owner by an individual claiming to have sustained private damages in consequence of such structure. Kallsen v. Wilson, 80 Iowa, 229, 45 N. W. 765.

The city council of New Orleans has been held to be vested with a discretion in declaring what is a nuisance which will not be interfered with by the courts unless their action has been manifestly unreasonable or oppressive, invaded private rights and transcended the power given to it. State v. Heidenhain, 42 La. Ann. 483, 7 So. 621, 2 Am. St. R. 388, 2 Am. Ry. & Corp. Rep. 733.

The action of the board of supervisors of San Francisco in declaring that certain materials such as garbage are nuisances has been held to be conclusive of the fact. Sanitary Reduction Works v. California Reduction Co., 94 Fed. 693.

structure was an encroachment or obstruction, did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the city or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all the property of the city, at the uncontrolled will of the temporary local authorities."[8] So, where an ordinance declared a laundry a nuisance it was said by the court: "There is nothing tending in the slightest degree to show that this laundry is, in fact, a nuisance, and the uncontradicted allegations of the petition are that it is not. So far as appears, it is only made a nuisance by the arbitrary declaration of the ordinance and it is beyond the power of the common council by its simple fiat to make that a nuisance which is not so in fact.[9] To make an occupation indispensible to the health and comfort of civilized man, and the use of the property necessary to carry it on, a nuisance, by a mere arbitrary declaration in a city ordinance, and suppress it as such, is simply to confiscate the property and deprive the owner of it without due process of law. It also abridges the liberty of the owner to select his own occupation and his own methods in the pursuit of happiness, and thereby prevents him from enjoying his rights, privileges and immunities and deprives him of equal protection of the laws secured to every person by the Constitution of the United States."[10] It has, however, been decided that the action of a municipality in declaring a thing to be a nuisance may give rise to a *prima facie* presumption of its being a nuisance.[11]

§ 334. Same subject—Where there is doubt whether a thing is a nuisance.—While a municipality cannot declare that a

8. Yates v. Milwaukee, 10 Wall. (U. S.) 497, 19 L. Ed. 984, per Mr. Justice Miller.

9. Yates v. Milwaukee, 10 Wall. (U. S.) 505.

10. In re Sam Kee, 31 Fed. 680, 681, per Sawyer, J.

11. State v. Marshall, 50 La. Ann. 1176, 24 So. 186. See Council of Montgomery v. Hutchinson, 13 Ala. 573.

nuisance which is clearly not one, yet the power of a municipality has been recognized to declare a certain thing a nuisance where there is a doubt whether it is in fact a nuisance or not. So in the case of a slaughterhouse which is in its nature a nuisance, it has been decided that a declaration by ordinance that it is a nuisance is conclusive of the fact.[12]

And it has been likewise so held of an ordinance providing that a rock crushing machine is a nuisance where maintained in a block where there are three or more dwellings which are occupied.[13]

In this connection the remarks of the court in a recent case in Illinois are pertinent. The court said: "We do not conceive it to be the law that city councils or boards of village trustees may conclusively declare that to be a nuisance which a court, acting upon its experience and knowledge of human affairs, would say is not so in fact. That which, however, is a nuisance because of its nature or inherent qualities, or because it is forbidden by law, may be denounced or declared a nuisance by an ordinance and such denunciation will be deemed conclusive. There are other things, trades, occupations and callings which, because of their nature or inherent qualities may or may not be nuisance in fact. As to this class we said in North Chicago City Ry. Co. v. Town of Lake View,[14] 'that, if it be doubtful whether a thing is in its nature a nuisance,—that is, whether it is in fact a nuisance,—the determination of the question requiring judgment and discretion on the part of the village authorities in exercising their legislative functions under the power delegated by the enactment we are considering, the action of such authorities should be deemed conclusive of the question.'" [15]

§ 335. **Ordinance must not discriminate—Must be uniform in operation.**—Though a municipality may have the power to declare by ordinance that a certain thing, or the doing of a

12. Harrison v. Lewiston, 153 Ill. 313, 38 N. E. 628, 46 Am. St. R. 893, aff'g 46 Ill. App. 164.

13. Kansas City v. McAleer, 31 Mo. App. 433.

14. 105 Ill. 207, 44 Am. Rep. 788.

15. Laugel v. City of Bushnell, 197 Ill. 20, 63 N. E. 1086, 1087, per Boggs, J.

certain act, or the carrying on of a certain trade or business, or a specified use of property is a nuisance, yet the ordinance to be valid must be uniform in its operation and affect all who come within the scope of its provisions in a like manner. It cannot discriminate against some one individual or individuals either in express terms or by the manner in which it may operate.[16]

As has been said in a case in Maryland; "while we hold that this power of control by the courts is one to be most cautiously exercised, we are yet of the opinion that there may be a case in which an ordinance passed under grants of power like those we have cited, is so clearly unreasonable, so arbitrary, oppressive or partial, as to raise the presumption that the legislature never intended to confer the power to pass it, and to justify the courts in interfering and

16. May v. People, 1 Colo. App. 157, 27 Pac. 1010; Lake View v. Tate, 33 Ill. App. 78; Bills v. City of Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 261. But see, however, Fischer v. St. Louis, 194 U. S. 361, wherein it is decided that an ordinance prohibiting the erection of any dairy or cow stable within the city limits without permission from the municipal assembly and providing for permission to be given by such assembly, is a police regulation, and is not unconstitutional as depriving a person who violates such ordinance of his property without due process of law or as denying him the equal protection of the laws. The court here said: "We do not regard the fact that permission to keep cattle may be granted by the municipal assembly as impairing in any degree the validity of the ordinance, or as denying to the disfavored dairy keepers the equal protection of the laws. Such discrimination might well be made where one person desired to keep two cows and another fifty; where one desired to establish a stable in the heart of the city and another in the suburbs, or, where one was known to keep his stable in a filthy condition and another had established a reputation for good order and cleanliness. Such distinctions are constantly made the basis for licensing one person to sell intoxicating liquors and denying it to others. The question in each case is whether the establishing of a dairy and cow stable is likely, in the hands of the applicant, to be a nuisance or not to the neighborhood, and to imperil or conduce to the health of its customers. As the dispensing power must be vested in some one, it is not easy to see why it may not properly be delegated to the municipal assembly which enacted the ordinance. Of course, cases may be imagined where the power to issue permits may be abused and the permission accorded to social or political favorites and denied to others, who for reasons totally disconnected with the merits of the case, are distasteful to the licensing power. No such complaint, however, is made to the practical application

setting it aside as a plain abuse of authority." [17] So a resolution of a municipal corporation, directing a soap factory in a particular street to be removed within a certain time, unless put in such a condition as not to be a nuisance and imposing a fine on the parties interested in the factory for every infraction of the resolution, in case, after the time limited complaint should be made by any three inhabitants under oath, that said factory continues to be a nuisance has been held illegal and unenforceable, it being declared that a fine is a pecuniary punishment for an offense against the laws of the municipality; that an ordinance imposing a fine is a penal enactment and must be general in its operation; and that an ordinance may impose fines on persons carrying on offensive trades in a certain street or suburb, or district where they would be injurious to the public health, but that an ordinance designating one individual, or one establishment, and subjecting the owners to punishment, is contrary to common right.[18]

of the law in this case, and we are led to infer that none such exists. We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public and upon conditions applying to the health and comfort of the neighborhood." Per Mr. Justice Brown.

17. Baltimore v. Radecke, 49 Md. 217, 229, 33 Am. R. 239, per Miller, J.

18. "The power of the council of the municipality to impose fines for the violation of municipal ordinances is conceded, and the duty of the municipal government to maintain, by all lawful means, the cleanliness and salubrity of the city, and its possession of ample powers to that effect, are not questioned. But it is urged by counsel that the imposition of a fine must be by ordinance of a general character, operation and effect, and that individuals cannot be affected by the passage of resolutions against them personally, as, it is contended, is done in the present instance. . . . A fine can be considered as nothing else than a pecuniary punishment for an offense against the laws of the municipality, which the by-laws and ordinances in fact are. An ordinance imposing a fine is in every sense a penal enactment, and by its essence must be general in its operation. . . . To designate one individual, or one establishment, and subject its owners to punishment, appears to us to be entirely inadmissible, and contrary to common right. We think the exception is well taken by counsel to the legality of this fine. The exercise of a power like this assumed by the council of this municipality, would be attended with most dangerous consequences. Indeed it has more resemblance to an imperial rescript, than a rule for the conduct of citizens under a government of laws, enacted by a body possessing

§ 336. Same subject—Where ordinance prohibits unless permission obtained.—An ordinance will not be upheld as valid where it prohibits the doing of a certain thing and provides that it shall be regarded as a nuisance if done without permission from the local authorities but reserves to such authorities the right to arbitrarily grant or refuse a permit without regard to whether a nuisance will in fact be created thereby. Such an ordinance would give the municipal authorities the power to permit one individual who was possibly in favor with them to do an act which, without reason, they might refuse to permit another individual to do under the same or similar conditions. An ordinance requiring a permit should, to be valid, specify the rules and conditions to be observed in such cases and must admit of the exercise of the privilege by all citizens alike who will comply with such rules and regulations.[19] So, a by-law providing that "No person shall keep a slaughterhouse within the city without the special resolution of the council" has been held not to be within a power granted to regulate or prevent the erection or continuance of slaughterhouses which may prove to be a nuisance, it being declared that such a by-law permitted favoritism by the council which might be exercised in restraint of trade or to grant a monopoly, and that all persons in such trade were not placed or were liable not to be placed on the same footing.[20] And it has been declared that a municipal ordinance to regulate the carrying on of public laundries within the limits of the municipality violates the provisions of the United States Constitution where it confers upon the municipal authorities arbitrary power, without regard to discretion, in the legal sense of

mere powers of administration. First Municipality of New Orleans v. Blineau, 3 La. Ann. 688, per Eustis, C. J.

19. "It seems . . . to be well established that municipal ordinances placing restrictions upon lawful conduct, or the lawful use of property, must, in order to be valid, specify the rules and conditions to be observed in such conduct or business, and must admit of the exercise of the privilege by all citizens alike, who will comply with such rules and conditions; and must not admit of the exercise, or of the opportunity for the exercise of any arbitrary discrimination by the municipal authorities between citizens who will so comply." City of Richmond v. Dudley, 129 Ind. 112, 116, 28 N. E. 312, 28 Am. St. R. 180, 13 L. R. A. 587, per Miller, J. See Boyd v. Board of Councilmen of Frankfort (Ky. C. A., 1903), 77 S. W. 669.

20. Nash v. McCracken, 33 Up. Can. Q. B. 181.

the term to give or withhold consent as to persons or places, without regard to the competency of the persons applying or the propriety of the place selected for the carrying on of a trade or business such as a laundry.[21] And it has been decided that an ordinance which prohibits the erection of any slaughterhouse within three hundred feet of any dwelling without the consent of the owner is invalid as attempting to substitute for the sanction of a law the written consent of one or more individuals.[22] So, an ordinance prohibiting the keeping of dairies within certain prescribed limits, but giving the city council power to grant or refuse a permit to maintain them within such limits has been held to be void as not being general in its operation among the class it is designed to effect.[23] It was declared by the court in this case that this ordinance established "an inequality, granting to some persons following the same occupation, privileges that are not extended to others. The ordinances do not regulate dairies in the interest of public health. One dairy may be a nuisance because the city council has refused to give the required permission for its establishment; another may be perfectly harmless and in no way detrimental to public health because it exists by permission of the council. They may exist alongside of each other, both unobjectionable in their police regulations, and one a nuisance and the other a lawful establishment. Both the original and amended ordinances violate equal rights among the class they are designed to affect, and are, therefore, necessarily void, so far as they do so."[24]

§ 337. **Same subject—Ordinance requiring permit for processions, parades, etc.**—One of the leading cases in which this question is considered involved the construction of an ordinance which prohibited any person or persons, association or organizations from marching, parading, riding or driving in or upon the streets of the city, with musical instruments, banners, flags, torches or flambeaux or while singing or shouting, without first

21. Yick Mo v. Hopkins, 118 U. S. 373, 30 L. Ed. 227. See Ex p. Sing Lee, 96 Cal. 354, 31 Pac. 245, 24 L. R. A. 195, 31 Am. St. R. 218.

22. St. Louis v. Howard, 119 Mo. 41, 24 S. W. 770, 41 Am. St. R. 630.

23. State v. Mahner, 43 La. Ann. 496, 9 So. 480.

24. Per McEnery, J.

having obtained the consent of the mayor or common council. Funeral and military processions were excepted, but were required, as also those permitted by the mayor or council, to conform to such directions as the mayor or chief of police might give in relation to the streets to be used, and the portion thereof to be occupied and the manner of such use. A member of the Salvation Army was arrested for an alleged violation of this ordinance and was ordered discharged in *habeas corpus* proceedings brought to secure his release, the court declaring that the ordinance was an arbitrary and unwarranted exercise by the municipality of the powers conferred upon it and was unreasonable because it suppressed what was lawful and left to an unregulated official discretion the power of permitting or restraining processions, and their courses.[25] The following words of the court are of value in this connection: "There is no express reference in the charter to the use of streets for processions, and no power is given to license or regulate them in terms. It contains no reference to the streets beyond such as contemplates that they shall be under municipal oversight in the usual ways, some of which are mentioned. Counsel for the city referred to various powers which they claim cover the ordinance in question. These were the power 'to prevent vice and immorality, to preserve public peace and good order, to prevent and quell riots, disturbances, and disorderly assemblages.' 'To prevent the cumbering of streets, sidewalks, etc., in any manner what-ever.' 'To control, prescribe and regulate the manner in which the highways, streets, avenues, lanes, alleys, public grounds and spaces within said city shall be used,' 'To prohibit practices, amusements and doings in said streets, having a tendency to frighten teams and horses, or dangerous to life and property.' 'To prohibit, and prevent any riot, rout, disorderly noise, disturbance, or assemblage in the streets or elsewhere in said city.' 'To provide for maintaining the peace and good government of said city.' If the legislature of the State had the power to subject the people of cities to the uncontrolled and arbitrary will of a common council, and having such power, had clearly signified their

25. Matter of Andrew Frazee, 63 Mich. 396, 30 N. W. 72, 6 Am. St. R. 310.

purpose to do so, then it might, perhaps, be claimed with some show of reason that the city of Grand Rapids could do what it pleased under these grants of power. But the rules of legal construction allow no such absurdity. It is not in the power of the legislature to deprive any of the people of the enjoyment of equal privileges under the law, or to give cities any tyrannical powers. All charters and all laws and regulations, to be valid for any purpose, must be capable of construction, and must be construed in conformity to constitutional principles and in harmony with the general laws of the land; and any by-law which violates any of the recognized principles of legal and equal rights is necessarily void so far as it does so, and void entirely if it cannot be reasonably applied according to its terms.

We must therefore construe this charter and the powers it assumes to grant, so far as it is not plainly unconstitutional, as only conferring such power over the subjects referred to as will enable the city to keep order and suppress mischief, in accordance with the limitations and conditions required by the rights of the people themselves, as secured by the principles of law, which cannot be less careful of private right under a constitution than under the common law.

It is quite possible that some things have a greater tendency to produce danger and disorder in cities than in smaller towns or in rural places. This may justify reasonable precautionary measures, but nothing further; and no inference can extend beyond the fair scope of powers granted for such a purpose, and no grant of absolute discretion to suppress lawful action altogether can be granted at all. That which is an actual nuisance can be suppressed just so far as it is noxious, and its noxious character is the test of its wrongfulness. There may be substances, like some explosives, which are dangerous in cities under all circumstances, and made dangerous by city conditions. But most dangerous things are not so different in cities as to require more than increased or qualified safeguards; and to suppress things not absolutely dangerous, as an easy way of getting rid of the trouble of regulating them, is not a process tolerated under free institutions. Regulation and not prohibition, unless under clear authority of the charter, and in cases where it is not oppressive, is the extent of city power.

Whatever regulation is made must operate uniformly under the same conditions. It is competent to hold all persons liable for any actual wrong done which creates dangerous or noxious consequence. That is already provided for under the law of nuisances. These processions might, no doubt, become nuisances, as any others might, it cannot be assumed that they will, and it appears in the record before us that they have been judicially adjudged otherwise when prosecuted. Any doctrine that would hold them legally objectionable in themselves would cover every military or political or society procession that ever assumed respectable proportions. All by-laws made to regulate them must fix the conditions expressly and intelligibly, and not leave them to the caprice of anyone. . .

This by-law is unreasonable because it suppresses what is in general perfectly lawful, and because it leaves the power of permitting or restraining processions and their courses to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent legal provisions operating generally and impartially."[26] And in a case in Kansas which violated the construction of a similar ordinance it was declared that the ordinance was unreasonable, that it did not fix the conditions uniformly and impartially, that it contravened common right and was illegal and void.[27]

§ 338. **Municipal power to declare a cemetery a nuisance.**— A municipality possesses no power by virtue merely of an authority to abate and remove nuisances to declare a cemetery, in a proper locality, a nuisance, it not being one necssarily.[28] So the power

26. Per Campbell, J.

27. Anderson v. City of Wellington, 40 Kan. 173, 19 Pac. 719, 2 L. R. A. 110, 10 Am. St. R. 175.

28. Town of Lake View v. Letz, 44 Ill. 81, in which the court said: "The act of the legislature authorizing the board of trustees 'to abate and remove nuisances' gave them no power to pass an ordinance forbidding the establishment of a cemetery. Conceding that the power 'to abate and remove' should be construed as including the power to prevent, yet this preventive power could only be exercised in reference to those things that are nuisances in themselves, and necessarily so. There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this re-

conferred upon a city to protect the health of its inhabitants and to remove nuisances does not authorize the passing of an ordinance providing that the burial of a dead body within the city limits will constitute a nuisance where there are certain portions of the city in which interments could be made, at such a distance from any inhabitant or public thoroughfare as to in no way offend the senses or endanger the health of the community.[29]

spect depending on circumstances. Now, the town of Lake View is a rural township, containing about eleven sections or square miles of territory. It is, therefore, impossible to hold, that a cemetery, anywhere within the limits of the town, must be necessarily a nuisance, and can be prohibited in advance as such. A cemetery may be so placed as to be injurious to the public health, and therefore a nuisance. It may, on the other hand, be so located and arranged, so planted with trees and flowering shrubs, intersected with drives and walks, and decorated with monumental marbles, as to be not less beautiful than a public landscape garden, and as free from all reasonable objection. The power to prohibit the establishment of cemeteries except by the authority of the trustees cannot be considered as falling within the power to abate and remove nuisances." Per Mr. Justice Lawrence.

29. Wygant v. McLauchlin, 39 Ore. 429, 64 Pac. 867. The court here said: "Defendant's counsel insist, however, that the authority requisite for excluding burials from within the city limits may be referable to the general police power incident to all municipal corporations, and beyond this, it is urger that the words of the charter 'to provide for the health, cleanliness, ornament, peace and good order of the city,' are commensurate for the purpose. The power thus conferred is no doubt ample to authorize the city to adopt reasonable measures prescribing rules and regulations, as it respects the place and manner of burials within the city limits; but the city cannot arbitrarily prohibit them, unless such prohibition be a reasonable exercise of the power. . . . Now it is an admitted fact that there are considerable tracts of land comprised within the limits of the city which are sparsely inhabited. As was said by the court below, 'there are within the corporate limits of the city of Portland several large tracts of land, which are used solely for farming purposes, some of them containing several hundred acres, and on some of them interments could be made which would be distant a half mile or more from any human inhabitant or public thoroughfare.' Under these conditions it is assuredly not a reasonable regulation as a police provision or for the conservation of the health or good order of the community, to exclude burials from the whole territory, save the districts enumerated by the ordinance. If, however, as before indicated, the legislature had granted special and express power to exclude burials from within the city limits, the adoption of such an ordi-

§ 339. **Validity of particular ordinances.**—Power to declare what are nuisances and to provide for their removal gives no authority to a municipality to regulate the running of trains through the city and to provide that the running of them at a certain speed shall constitute a nuisance as the legislation of the municipality must be subordinate to that of the State, to which it owes its existence. It is not authorized to unwarrantably interfere with franchises granted by the State to be exercised for the public good.[30] And such power conferred in general terms does not authorize the passing of an ordinance declaring that "all public picnics and open-air dances," are nuisances, without regard to their character,[31]

nance would be a legitimate exercise thereof, and no one could question its validity. Yet, when the nature of the power delegated enjoins upon the city the duty of adopting such measures only as are reasonable that becomes the measure of the limit of the power, and any act in excess thereof is without legal efficacy." Per Wolverton, J.

30. New Jersey R. & T. Co. v. Jersey City, 29 N. J. L. 170, holding under such a provision no power exists in a common council to declare any thing a nuisance which can not be detrimental to public health or convenience, or dangerous to the citizens, and even then not when the thing complained of has been authorized by the supreme legislative power of. Compare Lake View v. Tate, 33 Ill. App. 78, holding that a municipality may regulate the speed of trains, but declaring that such an ordinance must not tend to discriminate.

31. "That public picnics and public dances are not in their nature nuisances, we think is quite clear. They are not in the list of common law nuisances enumerated in the text books . . . Nor is there necessarily anything harmful in the nature of either, more than in that of any other public amusement. When conducted with proper decorum and circumspection and remote from public thoroughfares, it is impossible to conceive how any public injury or annoyance can result. That the manner of conducting them may be productive of annoyance and injury to the public is not to be questioned, but since the nuisance must consist in this, and cannot consist in the mere fact that there is a picnic or dance, the ordinance must be directed only to it. While the right of the people to be free from disturbance and reasonable apprehension of danger to person and property is to be respected and jealously guarded, the equal right of all to assemble together for health, recreation or amusement in the open air is no less to be respected, and jealously guarded. Because a privilege may be abused is no reason why it shall be denied." Village of Des Plaines v. Poyer, 123 Ill. 348, 350, 14 N. E. 677, 5 Am. St. R. 524, per Mr. Justice Scholfield, aff'g 22 Ill. App. 574.

or that every barbed wire fence within the limits of the town is a nuisance.[32] And it has been deecided that lime kilns within the city limits cannot by ordinance be made nuisances without regard to their location under authority conferred on a municipality to preserve the health and to prevent and remove nuisances.[33] It has, however, been decided that a city may in the exercise of its legitimate police powers prevent the maintenance of wires upon or over the roofs of houses, where their maintenance in such a place is dangerous both by reason of their liability to cause fires and also to obstruct the extinguishment of a fire originating from any cause.[34] And it has been held in some cases to be a valid exercise of the power of a municipality over nuisances to prohibit the using or keeping of intoxicating liquors in places of a certain class, such as refreshment saloons or restaurants.[35]

32. Mason City v. Barngrover, 26 Ill. App. 296. As to fences encroaching on highway, see §§ 239, 240, herein.

33. State v. Mott, 61 Md. 297, 48 Am. Rep. 105. Compare Ward v. Washington, Fed. Cas. No. 17, 163, 4 Cranch C. C. 232, holding that under a similar provision a city might by ordinance prohibit the erection and use of lime kiln without a license. As to brick and lime kilns, see §§ 111, 145, herein.

34. Electric Improvement Co. v. San Francisco City and County, 45 Fed. 593. The court said in this case: "The only wonder is that owners of buildings in view of the recognized danger will permit their use for such purposes. True, the supervisors cannot make an article dangerous by simply declaring it to be so, when, in fact, it is not. But the practice as it now prevails, against which this ordinance is directed, is shown to be dangerous, and we, ourselves, all know it to be so. There can be no successful disputing of the fact. The order is general and applicable to all. If it is not enforced as to all it ought to be, and the chief of police declares his purpose to enforce it, in all cases, that come to his notice. I see no good reason to believe that it was passed for the purpose of discrimination in favor of another company, as claimed, or that it is intended to be so enforced. I do not think it violates any provision of the national constitution. I regret to be obliged, by this decision, to affect, so seriously, the interests of the enterprising parties who are endeavoring to supply our citizens with electricity for the various purposes to which it is now applied. But I cannot decline to administer the law as I find it for the safety and security of the lives and property of the citizens of San Francisco." Per Sawyer, J.

35. State v. Clark, 28 N. H. 176, 61 Am. Dec. 611. See Laurel v. City of Bushnell, 197 Ill. 20, 63 N. E. 1086, affirming 96 Ill. App. 618. But see Darst v. People, 51 Ill. 286, 2 Am. Rep. 301.

§ 340. **Same subject continued.**—It may be provided by ordinance that slaughter houses within the city limits are nuisances, where power is conferred upon the municipality to declare what are nuisances, and also to designate the location of slaughter houses.[36] And an ordinance forbidding one to allow weeds of a certain height to grow upon his property and declaring that "the word 'weed' as used herein shall be held to include all ranks or vegetable growth which exhale unpleasant or noxious odors, and also high and vegetable growth that may conceal filthy deposits," does not violate provisions of the constitution, that all persons have a natural right to life, liberty, and the gains of their own industry or that private 'property' shall not be taken for private use without just compensation.[37] And under a code provision that cities shall have power to prevent riots, noise, disturbance or disorderly assemblages and to suppress and restrain disorderly houses it has been decided that a city may by ordinance make it a common nuisance to keep or control a house or building, within the city

The liquor traffic is generally subject to statutory control, but under power given to a municipality to grant or refuse a license and also to restrain, prohibit and suppress tippling houses and dram shops, it may declare that the sale of intoxicants within the corporate limits is a nuisance. Block v. Town of Jacksonville, 36 Ill. 301, citing City of Pekin v. Smelzel, 21 Ill. 464; Trustees of Jacksonville v. Holland, 19 Ill. 271; Byers v. Trustees of Olney, 16 Ill. 35; Goddard v. Jacksonville, 15 Ill. 588.

Power given by charter to a municipality to regulate the opening on Sunday of places where liquors are sold does not control State laws which may be enforced within such limits. Ginnochio v. State, 30 Tex. App. 584, 18 S. W. 82.

36. Rund v. Fowler, 142 Ind. 214, 41 N. E. 456, holding that a slaughter house erected or conducted in violation of an ordinance prohibiting its maintenance within the corporate limits of the town became a nuisance although it would not be such in the absence of such ordinance. Darcantel v. People's Slaughter House & R. Co., 44 La. Ann. 632, 11 So. 239, 37 Am. & Eng. Corp. Cas. 518; Villavosa v. Barthet, 39 La. Ann. 24, 1 So. 599; Portland v. Meyer, 32 Ore. 368, 52 Pac. 21, holding that a charter power conferred upon a municipality to exclude from the city slaughter houses authorizes it to exercise such power in respect to those established at the time of the passage of an ordinance prohibiting their continuance and does not violate any constitutional right of a proprietor of such an establishment. As to slaughter houses generally, see §§ 126-131, herein.

37. City of St. Louis v. Galt, 172 Mo. 8, 77 S. W. 876, 63 L. R. A. 778.

limits, in which loud or unusual noises are permitted, or persons are allowed to assemble and use profane and vulgar language, to the disturbance of others.[38] It has, however, been determined that power conferred upon a city to pass such ordinances as may be deemed necessary for the better government of the same or a general law authorizing towns to pass such laws as may be necessary to abate a nuisance does not authorize it to pass an ordinance making it an offense for either the owner or occupant of a house or part thereof to allow the cohabitation therein of males and females who have not been lawfully married. Such an ordinance is declared to be not only unauthorized but unreasonable even though the power were conferred upon the municipality in express terms to suppress bawdy houses.[39]

§ 341. Powers of municipality as to erection of structures—Authorization by legislature.—The legislature may authorize a municipality to prohibit the erection of certain kinds of structures within its limits.[40] And where the legislature or a municipality duly authorized enacts a general statute or ordinance prohibiting certain erections within a prescribed territory, and declares an erection in violation of such statute or ordinance a public nuisance, it has been declared that the reasonableness of the prohibi-

38. City of Centerville v. Miller, 57 Iowa, 56, 10 N. W. 293.

39. "The power to prevent nuisances does not directly or by implication carry with it the authority to hold the owner of a building, who may never himself visit it, responsible for the nuisance of keeping a house of prostitution, bawdy house, or house of ill fame, committed by his tenant without his knowledge or consent, and subject him to a fine, to say nothing of the disjunctive liability to be deemed the keeper of a house of ill-fame, and to have the inference drawn against him on account of the bad character rather than the conduct of those who occupy his houses as lessees or frequent them. Such a by-law is not only unauthorized but unreasonable. If the power to suppress bawdy houses had been given in express terms, as has been done in some instances, the city could not even then have usurped the authority to enact that persons not guilty of nuisance under the established principles of law should be deemed guilty of keeping bawdy houses, and to prescribe new rules of evidence to be adopted on the trial." State v. Webber, 107 N. C. 962, 12 S. E. 598, 22 Am. St. R. 920, per Avery, J.

40. City of Salem v. Maynes, 123 Mass. 372; Respublica v. Duquet, 2 Yeates (Pa.), 493.

tion is not thereafter open to question.[41] So a municipality where it has been authorized by the legislature "to prevent and remove all nuisances" and "to regulate and prevent the carrying on of manufactories dangerous in causing or promoting fires" may declare to be nuisances "all steam grist mills, saw mills or other machinery contained . . . in buildings . . . wholly or in part of wood, which establishment, by reason of the defect or dilapidation of the buildings, the defective construction of the machinery . . . or any other cause, are or shall hereafter become dangerous to persons or property."[42] But where a city was authorized by its charter to "establish such regulations for the prevention and extinguishment of fires, as the city council deem expedient" and an amendment to the charter contained a specific enumeration of the acts which the city might do "for the purpose of guarding against calamities by fire" it was decided that such enumeration operated as a limitation upon the general power conferred in the original charter upon the principle that where a thing is directed to be done through certain means, or in a particular manner, there is an implied inhibition upon doing it through other means or in a different manner. In this case it was decided that an ordinance prohibiting the erection of buildings of combustible material within certain limits was void as not being specifically authorized by the amendment to the charter.[43]

§ 342. **Powers as to structures and erection of or establishment of fire limits—Want of legislative authorization.**—The authorities are not in harmony as to the right of a municipality to prohibit the erection of certain structures within its limits or to declare such structures nuisances where there is no express authorization by the legislature to so act. The general rule, however, as sustained by the weight of authority, seems to be that where no power is conferred upon the municipality either by its charter or any general or special laws or does not arise by necessary implication it can not restrict the erection of a wooden or frame

41. Griffin v. City of Gloversville, 67 App. Div. (N. Y.) 403, 408, 73 N. Y. Suppl. 684, per Chase, J.

42. Green v. Lake, 60 Miss. 451.

43. City of Keokuk v. Scroggs, 39 Iowa, 447.

structure within the city or declare such a structure a nuisance and subject it to removal.[44] And it has been decided that where no power is conferred on a municipality by its charter to restrict the erection of a wooden or frame building within its corporate limits it has no authority to prohibit the erection of such a structure.[45] So in a case in Texas it has been decided that power to pass an ordinance establishing fire limits and declaring wooden buildings erected therein to be nuisances is not conferred by a provision in the charter of a municipality authorizing it to "ordain and establish such acts, laws, regulations, and ordinances not inconsistent with the constitution or laws of this State, as shall be needful for the government, interests, welfare, and good

44. Yates v. Milwaukee, 10 Wall. (U. S.) 497, 19 L. Ed. 984, holding that in the absence of any general laws upon the subject a municipality cannot declare a structure a nuisance and subject it to removal either by an individual or a city. Chicago, R. I. & P. R. Co. v. Joliet, 79 Ill. 25, holding that in the absence of a general law declaring a certain class of structures a nuisance, such a structure does not become one merely by a declaration of the municipal authorities to that effect. Village of St. Johns v. McFarlan, 33 Mich. 72, 20 Am. Rep. 671, holding that the erection of a wooden building within the limits of a city or village is not in and of itself a nuisance and does not become one by the mere fact that it is prohibited by ordinance.

An ordinance declaring a structure partially destroyed by fire to be a nuisance where it is permitted to remain in such a condition after a notice has been given to either remove, repair or rebuild the same, is held void where it contains no limitations as to its dangerous character either by reason of its weak condition or its location or surroundings. Evansville v. Miller, 146 Ind. 613, 45 N. E. 1054, 38 L. R. A. 161.

45. Mayor of City of Hudson v. Thorne, 7 Paige's Ch. (N. Y.) 261. The court here said: "The ordinance of the common council in this case is entirely directed against the erection of the building, and not against its occupation in such a manner as to render it dangerous in the promotion or originating of fires. And I infer from the affidavits that the ordinance was so framed for the purpose of merely preventing the erection of such buildings, as it appears there were such buildings already in existence, not only in other compact parts of the city, but also within the prohibited limits. . . . I am satisfied that under the provisions of this charter the legislature never intended to give to the common council the power to restrict the erection of wooden or frame buildings within the city, or to limit the size of buildings which individuals should be permitted to erect on their own premises. And as the ordinance is an attempt to exercise such a power only, it is inoperative and void." Per The Chancellor.

order of said body politic." The court here said: "Whether, under the charter, the city was empowered to pass such an ordinance, is the sole question presented for our consideration. The charter contains no express grant of such power. . . . The clause of the charter just cited certainly does not convey an unlimited authority to declare that to be a nuisance which 'in its nature, or its situation, or use, is not such.'[46] Neither in its legal nor general meaning does the word nuisance apply to wooden buildings, even in towns and cities. The erection and occupation of such buildings is an ordinary exercise of the property rights of the owner of the lands, and is far from falling within the legal definition of a nuisance at common law. The power to prohibit such buildings in certain localities is statutory, and is a limitation on the ordinary rights of property. Whilst the legslative power to authorize such prohibitions is now conceded, the nature of the power is so high and the subjects themselves so far various that it seems not naturally embraced in the subordinate power to declare and abate nuisances. To so construe it would be to extend the grant of power to a subject, not, we think, within the intention of the law makers in the clause cited. . . . We are also of opinion that the general grant of power to establish ordinances needful for the welfare of the city did not authorize the passage of such ordinances as the one in question. Municipal corporations can exercise those powers only 'which are expressly or impliedly conferred, subject to such regulations or restrictions as are annexed to the grant. The general disposition of the courts of this country has been to confine municipalities within the limits that a strict construction of the grant of powers in their charters will assign to them; thus applying substantially the same rule that is applied to charters of private corporations. The reasonable presumption is, that the State has granted, in clear and unmistakable terms, all it has designed to grant.'[47] . . . To infer the power to establish fire limits from the general terms used in this charter, would be to disregard the rule of construction just cited, and would go far in the direction of the opposite proposition, that specific grants of power are unnecessary. If this gen-

46. 1 Dillon on Mun. Corp. § 308; Yates v. Milwaukee, 10 Wall. 498.

47. Cooley on Const. 192, 195.

eral clause includes the power claimed, it would seem difficult to place limits on its meaning. It is true that Judge Dillon in his work on municipal corporation, says: 'Municipal corporations, with power to provide for the safety of their inhabitants, may prohibit the throwing of heavy or dangerous articles from the upper stories of buildings into the streets or open spaces near them, where persons are in the habit of passing; and may establish fire limits, and prevent erection therein of wooden buildings.'[48] Of the cases referred to in the note to this section Wadleigh v. Gilman,[49] is the only case where it is decided that such a general grant of power embraces all necessary police regulations, and includes a power to establish fire limits, and prevent erection therein of wooden buildings. Indeed there is not among the cases cited (and it is proper to remark that they are cited not on this point alone, but on other points growing out of fire ordinances) any other, nor have we found any other, unless it be one which we will now refer to at length, where such an ordinance appears to have been enacted without some specific legislative authority."[50] And in a case in Connecticut in which this question arose it appeared that the burgesses of a borough passed a by-law establishing fire limits and prohibiting the erection within such limits of any wooden or frame building and providng that "all new buildings or extensions of buildings therein shall be constructed of brick, stone, iron, or concrete, with fireproof roof, upon plans to be approved by the burgesses." It was claimed that authority to pass this ordinance was conferred by provisions in the charter of the borough authorizing it to organize a fire department and regu-

48. 1 Dillon on Munic. Corp. § 338.

49. 12 Me. 403.

50. Pye v. Peterson, 45 Tex. 312, 313-315, 23 Am. Rep. 608, per Gould, Associate Justice.

Judge Dillon, in his work on municipal corporations, § 405, says in the text that municipal corporations "may, where this is consistent with the general and special legislation applicable to the municipality, establish fire limits, and prevent erection therein of wooden buildings." In the note to this section he refers to the above case and says that his "text is referred to and it is admitted that it is supported by Wadleigh v. Gilman, and on the other hand the Mayor of Hudson v. Thorne is considered as opposed to it. Of course the question in each case must be decided in view of all the legislation of the State bearing upon it. The text in this edition has been slightly modified."

late the mode in which buildings should be secured against fire, to prevent the use of buildings for any purpose which might expose the borough to damage by fire, to appoint inspectors to see that the ordinances for protection against fire were complied with and "in general to provide adequate protection against fire and pass suitable police and health regulations." The court construed these charter provisions as conferring no power upon the burgesses to establish fire limits and to require that all new buildings within them should be constructed of brick, stone, iron or concrete, upon plans approved by the burgesses. And it was also declared that restrictions on the building or repairing of wooden structures in a city are invasions of private rights and to be strictly confined to their literal import.[51]

51. Pratt v. Borough of Litchfield, 62 Conn. 112, 25 Atl. 461. It was said by Judge Torrance in this case: "From an inspection of these sections it is quite clear that the power in question is not in express terms given in either of them. It is equally clear, we think, that it is not conferred by fair implication. . . . The main contention on the part of the borough was, that the power was conferred by section twenty in the words 'The burgesses are empowered . . . to provide adequate protection against fire.' Quite a number of authorities are cited upon the brief in behalf of the borough, to show that words of the same or nearly similar import as the words above quoted have been held to confer the power to pass an ordinance or by-law like the one here in question. We have no occasion to dissent from or criticize the authorities thus cited. The question now is one of construction, and in the solution of such a question so much depends upon circumstances special to each particular case in hand, that decided cases are seldom of much assistance directly, although they may be quite valuable as hints and guides in correctly applying rules of construction or as containing correct statements of those rules. Perhaps it may not be out of place here to advert to one or two of the general rules of construction applicable to the present case. In the first place a municipal corporation can exercise no power which is not by express terms or by fair implication conferred upon it. (Thomson v. Lee County, 3 Wall. (U. S.) 327; Minturn v. Larue, 23 How. (U. S.) 435; Willard v. Borough of Killingworth, 8 Conn. 247; City of Bridgeport v. Housatonic R. R. Co., 15 Conn. 475.) In the next place any doubt or ambiguity arising out of the terms used by the legislature must be resolved in favor of the public. (Minturn v. Larue, 23 How. (U. S.) 435; Sutherland on Stat. Construction, § 380 and cases cited in footnote.) Restrictions on the building or repairing of wooden structures in the populous part of a city, commonly designated as fire limits, are

§ 343. **Same subject continued.**—As, however, is stated in the preceding section, it is difficult to reconcile the various decisions. So it has been decided that a city may establish fire limits and prohibit the erection within such limits of a certain class of structures where its acts do not contravene the constitution.[52] And in a case in Indiana it has been declared that a wooden building is not in itself a nuisance but may become such by reason of its erection in a place prohibited by law and where the safety of adjoining property is endangered in which case it may be treated by the municipal authorities as a nuisance and its erection prohibited.[53]

invasions of private right and are to be confined strictly to their literal import. (Sutherland on Stat. Construction, § 367; Booth v. The State, 4 Conn. 65.) Lastly, the words of the charter from which it is claimed the power in question is granted, must be construed in connection with the entire charter, and in view of the general legislation in our State in matters of this kind. So far as we are aware general language like that here in question has never, by the profession or by the legislature, been deemed sufficient to confer authority to establish fire limits. . . . Coming now to the more particular consideration of the clause in question, we observe that even if it stood alone in a section by itself to construe it as conferring power to etsablish fire limits would be a very forced construction. It would be opposed to the fair natural meaning of the words employed. . . . Again when the power to establish fire limits has been expressly granted by the legislature, it has been customary in the charter to set some limits to the exercise of such an important power; but, if in the case at bar, these words confer such a power, it is given practically without limits, save the discretion of the burgesses."

52. Brady v. Northwestern Ins. Co., 11 Mich. 425. As to right to establish fire limits in particular cases and to prohibit the erection of wooden buildings within such limits, see Montgomery v. Louisville & N. R. Co., 84 Ala. 127; McCloskey v. Kreling, 76 Cal. 511; Brown v. Hunn, 27 Conn. 332, 71 Am. Rep. 71; Des Moines v. Gilchrist, 67 Iowa, 210, 56 Am. Rep. 341; State v. O'Neill, 40 La. Ann. 1171; Cordes v. Miller, 39 Mich. 581, 33 Am. Rep. 430; Eichenlaub v. St. Joseph, 113 Mo. 395, 18 L. R. A. 590; State v. Kearney, 25 Neb. 262; New York Fire Dep't. v. Buhler, 35 N. Y. 177; Cleveland v. Lenze, 27 Ohio St. 383; Hubbard v. Medford, 20 Ore. 315; Olympia v. Mann, 1 Wash. 389, 12 L. R. A. 150; Carroll v. Lynchburg, 84 Va. 803.

53. It was said by the court in this case: "A wooden building is not in itself a nuisance, but when erected in a place prohibited by law, and where it endangers the safety of adjoining property, it may become a nuisance. If the locality and character of such a building do endanger the safety of surrounding buildings, then it may be

So in a case in Louisiana it has been decided that the power to fix fire limits and to forbid the erection of buildings formed of combustible materials within such limits is inherent in a municipal corporation and does not depend on any legislative grant. The words of the court are pertinent in this connection, it being declared that "It seems to us clear that where a municipal corporation is vested with such powers,[54] and the compactness of its construction would increase the hazard of conflagration, the corporate authorities may fix what is known as a fire district and forbid the erection of wooden buildings therein. No town or city, compactly built, can be said to be well ordered or well regulated which neglects precautions of this sort. It is its duty to the public to take such measures as may be practicable to lessen the hazard and danger of fire. The public good and safety are superior to the individual rights of the inhabitants, and under this principle such regulations are not the divestiture of the individual right of ownership and use, but is only conforming the use of individual prop-

treated as a nuisance, and a governmental body, having authority to legislate upon such subjects, may prohibit its erection in places where it would endanger the safety of surrounding property. There are not many things that are not nuisances *per se*, but which become such when placed in locations forbidden by law, and where they essentially interfere with the enjoyment of life or property. . . . It must rest with the governmental authorities of the locality to determine in what places wooden buildings shall not be erected, for courts cannot exercise legislative functions in such matters. . . . Where, therefore, a valid municipal ordinance prohibits the location of wooden buildings within certain limits, and it appears, as it does here, that the building is located within the prohibited district, and endangers the safety of surrounding property, it may properly be treated as a public nuisance, and as such abated. We are not unmindful of the rule that a municipal corporation has no power to treat a thing as a nuisance which cannot be one; but while we recognize this rule, we also recognize the equally well settled rule that it has the power to treat as a nuisance a thing that from its character, location and surroundings, may, and does, become such." Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830, per Elliott, J.

54. The city was empowered by its charter to adopt all rules, ordinances, regulations and by-laws for the general government, improvement and police of the town, and prescribe the manner of enforcing them, not contrary to or inconsistent with the constitutions and laws of this State and the United States.

erty to the necessities, safety and interests of the public. It is a regulation of its enjoyment." [55] And in a case in Maine it has been decided that a municipality authorized "to ordain and establish such acts, laws and regulations, not inconsistent with the constitution and laws of the State, as shall be needful to the good order of said body politic" may, by ordinance, prohibit the erection of wooden building within certain limits of the city.[56] Again, in a recent case in Illinois, it is decided that municipalities organized under the city and village act in that State, have power to regulate by ordinance the construction and removal of wooden buildings anywhere within the corporate limits of the municipalities as incident to the power to declare what shall be nuisances and to abate and remove the same and to regulate the police of the town although such powers are conferred upon municipalities only in general terms.[57]

§ 344. **Same subject—Conclusion.**—In the consideraion of this question the elementary principle as to the power of municipal corporations should in all cases be borne in mind, that is, that such bodies can only exercise those power which are either expressly conferred upon them or arise by necessary implication out of some delegated power.[58] If this principle controls, and it is generally conceded that it does, then it would seem that in the absence of power so conferred, a municipality could not prohibit the erection of a wooden or other structure within its limits. Again, a municipality cannot declare that to be a nuisance which is not so in fact or does not come within the common law or statutory idea of a nuisance. This is a recognized principle which controls in construing ordinances or by-laws of a municipality declaring what is a nuisance.[59] A wooden building or structure is not a nuisance *per se,* and the true rule would seem to be that it does not become a nuisance by reason of an ordinance declaring it such, where it is not in fact one within the meaning of the common law or a statutory definition of a nuisance.

55. Mayor & Council of Monroe v. Hoffman, 29 La. Ann. 651, 29 Am. Rep. 345, per Howell, J.

56. Wadleigh v. Gilman, 12 Me. 403, 28 Am. Dec. 188.

57. Paterson v. Johnson, 214 Ill. 481, 73 N. E. 761.

58. See § 330, herein.

59. See § 332, herein.

§ 345. **Municipal powers to summarily abate—Generally.**—The rule is declared to be settled, without dissent, that, without a special grant of authority, public corporations may, as a common law power, cause the abatement of nuisances, and if the nuisance cannot otherwise be abated, may destroy the thing which constitutes it.[60] And it is said that a municipal corporation has not only the right, but is also under the obligation, to remove nuisances which may endanger the health of its citizens; that it has the power to decide in what manner this shall be done; and that its decision is conclusive unless it transcends the power conferred by the charter or violates the constitution.[60a] Again, where power is conferred upon a municipal corporation to protect the health of its citizens and to maintain the cleanliness of the city, it may adopt reasonable ordinances for the abatement or removal of nuisances.[61] And a municipality may regulate the use of property so as to prevent it becoming pernicious to citizens generally and when the use creates a nuisance, may prohibit owner from using it.[62] Nor will a city be liable in damages for abating that which is clearly a nuisance where the owner of the property has failed to abate it after being given a reasonable opportunity to do so and the city has acted in a lawful manner and no injury to property has been inflicted other than is actually necessary to abate such nuisance.[63] If the charter

60. Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830, per Elliott, J. See, also, Hart v. City of Albany, 9 Wend. (N. Y.) 571, 24 Am. Dec. 165; Commonwealth v. Yost, 11 Pa. Super. Ct. 323. See Kennedy v. Phelps, 10 La. Ann. 227.

60a. Baker v. City of Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421. "The sovereign power of a community may and ought to prescribe the manner of exercising individual rights over property. It is for the better protection and enjoyment of that absolute dominion which the individual claims. The powers rest on the implied right and duty of the supreme power to protect all by statutory regulations, so that, on the whole the benefit of all is promoted." Vanderbilt v. Adams, 7 Cow. (N. Y.) 349, 351, per Woodworth, J.

61. State v. Morris, 47 La. Ann. 1660, 18 So. 710.

62. Louisville City R. Co. v. Louisville, 8 Bush (Ky.), 416, 422; Ashbrook v. Commonwealth, 1 Bush (Ky.), 139, 89 Am. Dec. 616.

63. Orlanda v. Pragg, 31 Fla. 111, 12 So. 368, 19 L. R. A. 196, 41 Am. & Eng. Corp. Cas. 398; Miller v. Sergeant, 10 Ind. App. 22, 37 N. E. 418; Waggoner v. City of South Gorin, 88 Mo. App. 25.

of a city contains a provision as to the abatement of nuisances generally and there is also a specific provision in regard to the abatement of a nuisance of a particular kind, the specific provision will be applicable in case a nuisance of that particular kind arises to the exclusion of the general provision.[64] And a general statute will not control or repeal local or particular laws in reference to the powers of a municipality over nuisances unless they are named therein or necessarily embraced.[65]

§ 346. **Limitations or power to summarily abate or remove.**— A power given to a municipal corporation to abate nuisances in any manner it may deem expedient, is not an unrestricted power. Such means only are intended as are for the public good. The abatement must be limited by its necessity, and no wanton or unnecessary injury to the property or rights of individuals must be committed.[66] It must be so done as to cause the least injury to private rights,[67] and in such a manner as not to deprive an owner of the use of his property unless it is necessary.[68] And a munici-

64. Horbach v. City of Omaha, 54 Neb. 83, 74 N. W. 83, holding, also, that a statute conferring power upon a municipality "to require any and all lots or pieces of ground within the city to be drained, filled, or graded, so as to prevent stagnant water banks of earth or any other nuisance accumulating or existing thereon; and upon the failure of the owners of such lots or pieces of ground to fill, drain or grade the same, when so required, the council may cause such lots or pieces of ground to be drained, filled, or graded, and the cost and expense thereof shall be levied upon the property so filled, drained, or graded, and collected as other special taxes," was not invalid but rather a proper exercise by the State of its police power.

65. Mayor of Montezuma v. Minor, 70 Ga. 191, holding, also, that a prior general law providing for the abatement of a nuisance does not prevent the legislature from conferring upon a town or municipality a power to abate, and a town, where its charter so provides may have full power to abate a nuisance on report of the board of health, even though such nuisance consists of a mill and machinery run by water.

66. Babcock v. City of Buffalo, 56 N. Y. 268. "The taking or injuring of private property for the public benefit is the exercise of a high power, and all the conditions and limitations provided by law, under which it may be done must be closely followed. Too much caution in this respect cannot be observed to prevent abuse and oppression." Per Hall, J., in Frank v. City of Atlanta, 72 Ga. 428, 432.

67. State v. Mayor of Newark, 34 N. J. L. 264.

68. **Where the municipal au-**

pality cannot arbitrarily, by ordinance, provide for the destruction of private property or compel the owner thereof to destroy the same, unless it is in fact a nuisance.[69] And while a charter confers the power upon municipal authorities to prevent and remove all nuisances, it does not confer the right to declare that a particular structure or business, not condemned by any law or ordinance, is a nuisance and to have the structure removed or the business stopped or interfered with.[70] So a city empowered by its charter to declare what shall be a nuisance and to prevent and remove the same, is not thereby authorized to arbitrarily declare any particular thing a nuisance which had not theretofore been pronounced to be such by law or so adjudged by judicial determination.[71] In the

thorities fill a cellar with dirt to abate an alleged nuisance, the act is unauthorized where it appears that the nuisance could be abated by a drain. Waggoner v. City of South Gorin, 88 Mo. App. 25.

69. Pieri v. Town of Shieldsboro, 42 Miss. 493.

70. Lake v. City of Aberdeen, 57 Miss. 260. See Baldwin v. Smith, 82 Ill. 162. "It is only certain kinds of nuisances that may be removed or abated summarily by the act of individuals or by the public, such as those which affect the health, or interfere with the safety of property or person, or are tangible obstructions to streets and highways under circumstances presenting an emergency; such clear cases of nuisances *per se*, are well understood." Per Stone, J., in City of Denver v. Mullen, 7 Colo. 345, 354, 3 Pac. 693.

An order to abate not conclusive. An order of the municipal authorities ordering the destruction of property on the ground that it constitutes a nuisance has been decided in New York not to be conclusive where granted without a hearing, it being held that such an order is reviewable and that the owner of such property is entitled to a hearing in the courts upon the question. Golden v. New York Health Dept. 21 App. Div. N. Y.) 420, 47 N. Y. Suppl. 623. But see Brown v. District Council of Narrangansett, 21 R. I. 503, 44 Atl. 932, wherein it is decided that where a statute authorizes a municipality to summarily abate nuisances, and there is no provision therein allowing an appear, an order of abatement is not reviewable it being declared that to permit a nuisance to exist until an appeal could be tried might, together with such further proceedings in connection therewith as might be had, seriously endanger the health and lives of the entire community.

71. City of Denver v. Mullen, 7 Colo. 345, 3 Pac. 693. Examine Darst v. People, 51 Ill. 286, 2 Am. Rep. 201.

In a case in Georgia it is said: "Neither the municipal authorities of any city in this state nor any department of a city government have the legal right summarily to abate a nuisance, without first having given reasonable notice, to the person main-

application of these general rules it has been decided that the trustees of an incorporated village, who are authorized by its charter and by-laws to abate a nuisance, but are required to first give notice and an order to the owner to remove it, cannot justify their acts in removing a fence, under a notice to remove it, when the court below found that it was not the fence nor the lot, but the use the lot sheltered by the fence, that created the nuisance.[72]

§ 347. **Municipal authorities proceed at their peril in summary abatement of a nuisance.**—Where municipal authorites summarily abate a claimed nuisance by the destruction of private property, they do so at their peril where they proceed without first having the property condemned as a nuisance by appropriate proceedings and in an action against them in such a case for its value, the burden has been held to rest on them to show that it was in fact a nuisance.[73] As was said in a case in Georgia in which the right of the authorities to proceed in a summary manner in removing a mill pond on the ground that it was a nuisance were questioned: "Whenever the city authorities pro-

taining the thing or doing the act alleged to be a nuisance, of the time and place of hearing the question whether such thing or the doing of such act constitutes a nuisance, and the determination by such body that the thing so maintained or the act done, in law, constitutes a nuisance; and this rule of law applies to all acts and things alleged to be nuisances except those which are by the law expressly declared to be nuisances, or which are indisputably so *per se*." Western & Atlantic R. Co. v. City of Atlanta, 113 Ga. 537, 541, 38 S. E. 996, 54 L. R. A. 294, per Little, J.

In the case of a business which is not a nuisance *per se*, it has been decided that it requires action of a judicial nature to determine whether it is so conducted as to become liable to abatement. State v. Cadwallader, 36 N. J. L. 283.

72. Verder v. Ellsworth, 59 Vt. 354, 10 Atl. 89.

73. Mayor of Savannah v. Mulligan, 95 Ga. 323, 22 S. E. 621, 51 Am. St. R. 86, 29 L. R. A. 303; Gunning System v. City of Buffalo, 62 App. Div. (N. Y.) 497, 71 N. Y. Supp. 155. Compare as to burden of proof, City Council of Montgomery v. Hutchinson, 13 Ala. 573, holding that the action of a common council declaring a house in the city, from its dilapidated condition, endangering the lives of passersby, a nuisance, is *prima facie* evidence of the fact, casting on the party complaining of the act of the city, directing the razure of his house, the burthen of proving it was not a nuisance.

ceed in a summary manner, authorized by their charter, they do so at their peril. The owner of the pond in this case would not have been remediless at law. He would have had a right, in a suit at law, to establish, if he could, that the pond was not a nuisance; and if he could show that to the satisfaction of the jury, he would be entitled to such damages as he sustained by the summary action of the city authorities. It would be a great wrong upon the people living in crowded cities to hold that, in every case of nuisance, affecting perhaps the lives of hundreds or thousands of the inhabitants, the city authorities would have to go through a long and tedious trial before a court and jury, before they could abate or abolish the nuisance. But, as said before, when they do act, they must be certain that they are right and that the thing abated is a nuisance, or they will subject the municipality to damages."[74] And a similar view is expressed by the court in a New York case.[75]

§ 348. **Particular instances of power of municipality to abate nuisances.**—In the exercise of the powers conferred upon a municipality to remove and abate nuisances it has been decided that the municipal authorities may require lots to be filled where they are so much below the grade of a street as to cause a nuisance by reason of the accumulation thereon of waters which become stagnant.[76] And it has likewise been held that a municipality may

74. Americus v. Mitchell, 79 Ga. 807, 809, 5 S. E. 201, per Simmons, J.

75. "Whoever abates an alleged nuisance and thus destroys or injures private property or interferes with private rights, whether he be a public officer or a private person, unless he acts under the judgment or order of a court having jurisdiction, does it at his peril, and when his act is challenged in the regular judicial tribunals is must appear that the thing abated was in fact a nuisance. This rule has the sanction of public policy and is founded upon fundamental constitutional principles," per Earl, J., in People, Copcutt v. Yonkers Board of Health, 140 N. Y. 1, 10, 35 N. E. 320, 55 N. Y. St. R. 416, 37 Am. St. R. 522, 23 L. R. A. 481, affirming 71 Hun, 84, 54 N. Y. St. R. 317, 24 N. Y. Suppl. 629.

76. City of Independence v. Purdy, 46 Iowa, 202.

A city cannot raise lots higher than is necessary to abate the nuisance caused thereby. Bush v. City of Dubuque, 69 Iowa, 233, 28 N. W. 542.

Where the city creates the nuisance complained of, in such a

fill up a creek or ditch where it is of such a character as to be injurious to health.[77] So in the case of a manufactory which is injurious to public health a city may abate the same.[78] And the summary abatement of the use of a cesspool on private premises by the municipal authorities by the severance of a connecting pipe has been held a proper exercise of the municipal powers where the construction or maintenance of such vaults had been prohibited by a valid ordinance.[79] But it has been decided that sufficient grounds for the destruction of a bill board as a nuisance are not shown by the fact that it may become a place for the resort of lewd characters or that rubbish may be deposited there.[80] And it has also been de-

case it cannot require the filling of such lot. City of Hannibal v. Richards, 82 Mo. 330.

77. Baker v. City of Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421.

In the case of an irrigating ditch it should not be filled where the nuisance consists in the manner in which it is maintained and a destruction thereof by filling it is not necessary to abate the nuisance. Fresno v. Fresno Canal & I. Co., 98 Cal. 179, 32 Pac. 943.

The filling of a ditch is not justified where the nuisance created by it can be abated by a proper drainage thereof. And in a case in New Jersey, where it was so held, it was said by the court: "It is true that the council should be allowed considerable discretion in the mode to be adopted, yet it is very important, out of a due regard to private rights, that the superintending jurisdiction of this court over such proceedings should be firmly maintained, and the council kept within the reasonable rules of law. There seems to be no practical difficulty, from the evidence in sufficiently draining this ditch, and at the same time leaving it for all the legitimate uses of the business. In that light the council made a wrong selection of their powers. Then action should have been directed to the condition in which the ditch was kept, and the abatement of that condition, rather than in filling it up and depriving the owners of all use of it. To defeat its use for the legitimate purpose of drainage of the lots and receiving the waste water of the business, was an unreasonable and unnecessary invasion of private rights, when the nuisance complained of, as the case stands before us, could have been remedied by the less severe method of compelling a proper outlet or drainage for the ditch." State Rodwell v. City of Newark, 34 N. J. L. 264, 267, per Bedle, J.

78. Kennedy v. Phelps, 10 La. Ann. 227. See Fertilizing Co. v. Hyde Park, 97 U. S. 659.

79. Sprigg v. Garrett Park, 89 Md. 406, 43 Atl. 813.

80. Gunning System v. City of Buffalo, 62 App. Div. (N. Y.) 497, 71 N. Y. Suppl. 155.

The court said in this case: "It is said by the learned corporation counsel in his affidavit that these

cided that where a dam is erected by one under legislative authority, a municipality cannot, in the exercise of its power over nuisances, summarily remove such dam on the ground that it is a nuisance which endangers the public health where the owner thereof has been given no notice or opportunity to be heard upon the question.[81]

§ 349. **Right of municipality to destroy building.**—In the exercise of the power possessed by a municipality to remove a nuisance which affects or endangers the health or safety of the public, it has been decided that where a building is a nuisance of such a character it may be removed or destroyed by the municipal authorities where this is the only way by which the nuisance can be abated. So it has been decided that tenements consisting of two old and intrinsically valueless houses, on a lot in an improving and flourishing part of a city, which are filthy and crowded with filthy tenants, and which have been occupied by patients infected with smallpox and which had also been condemned as a nuisance by the board of health of the city, are nuisances and may be removed by the city authorities.[82] And where a municipality is, by its charter,

high structures erected upon vacant lots, will be a place of resort for lewd and vicious characters, a place where nuisances are committed and also a place of deposit for rubbish and all kinds of filth and refuse, whereby the peace and safety, as well as the health of the public will be endangered.' Conceding for the purpose of the argument that the prophecy of the affiant will come true, there is no suggestion upon the record that such things have happened, and there is no reason to suppose that, if such things do happen, the nuisance, if it is one, cannot be abated in some other way than by the destruction of the signboards. When any building or structure becomes a nuisance, not because of its inherent qualities, but because of the use to which it is put or the manner of that use, it is not to be destroyed to abate the nuisance, unless such destruction is absolutely necessary. If the nuisance can be abated by regulating the use, that is all that is permitted to be done. (Wood Nuis. § 740; Health Department v. Dassori, 21 App. Div. (N. Y.) 348.) So, even if the consequences apprehended by the defendants from the existence of these structures should ensue, it would not then be necessary to destroy them for the purpose of preventing that use," per Rumsey, J.

81. Clark v. City of Syracuse, 13 Barb. (N. Y.) 32.

82. Ferguson v. City of Selma, 43 Ala. 398.

authorized to prevent the erection of wooden buildings within certain limits and to remove buildings erected in violation of such ordinance it may, where a building is so erected, remove it, but where there has been in fact no violation of the ordinance and a building is removed, the city will be liable for its wrongful removal.[83] The fact that a municipality possesses the power to destroy a building which is a nuisance, will not justify it in the destruction of a building which is not a nuisance in itself.[84] So where power is conferred upon a municipality to remove a building which is eminently dangerous to life, it cannot, in an action against it by the owner of a building which has been destroyed, defeat a recovery by him unless it appear that the building was eminently dangerous so as to justify the exercise of the power conferred.[85] But where frame buildings were condemned as nuisances by a board of inspection it was held that the city was not liable for the torts of an independent board which was a creature of the statute and exercised powers derived from the State and not from the city and was constituted to perform some public service from which the municipality derived no special advantage in its corporate capacity.[86] Again, it has been decided that

83. McKibbin v. Fort Smith, 35 Ark. 352.

84. Bristol Door & L. Co. v. Bristol, 97 Va. 304, 33 S. E. 588; see §§ 350-352, herein.

A dwelling house cannot be made subject to removal by the mere declaration of the municipal authorities that it is a nuisance. Teass v. St. Albans, 38 W. Va. 1, 17 S. E. 400, 19 L. R. A. 802.

85. Hennessy v. St. Paul, 37 Fed. 565.

86. Murray v. Omaha, 66 Neb. 279, 92 N. W. 299, 13 Am. Neg. R. 138, in which case the court said: "We are of opinion that the city was not liable for the manner in which the board for the inspection of buildings exercised its office. The execution of laws and ordinances as to the erection, repair and removal of buildings was given expressly, not to the city, but to this board. The board was not under the control of the city government, but exercised its own discretion. It could not be ordered to condemn or remove this or that building. All the city could do was to enact ordinances providing general rules. When these were enacted, their execution and application was left to the board. The city did not enforce them. As the board was the creature of the statute, and exercised powers derived from the State, not from the city, we do not see how it can be said to represent the municipality so as to make the latter liable for its wrongful acts. The individual members are the persons to proceed against, not the city. As a general

though a common council of a city has expressly consented by permit to the erection of a structure and a person has expended money in reliance upon such permit, it may subsequently abate the structure as a nuisance. In this case it was said: "If the council was wrong in the course it pursued, the town is in no sense liable. Even after the works were fully erected and in operation, the town would have the right to abate them, if they proved to be a nuisance to the public or individuals. This belongs to its governmental and public powers. Every person engaged in a business that may become a nuisance must take notice of the law in this respect, although permitted to do so in the beginning by public authority. This is a risk assumed when such business is engaged in by such person. It is beyond the power of the town council to contract away the authority to prevent or abate nuisances, and if they should do so, their acts are *ultra vires* null and void, and the town is not bound thereby, nor made liable to damages by reason of a breach of such void contract." [87]

§ 350. Same subject—Where nuisance consists in use of building only.—A municipality in the exercise of its powers to

rule, a municipal corporation is not liable for the torts of an independent board, constituted by the charter or by general law to perform some public service from which the municipality derives no special advantage in its corporate capacity, even though the duties imposed upon such board might have been imposed upon the municipality, and its members are appointed by the municipal government under the provisions of the charter or law. 1 Beach on Public Corporations, § 740; Williams Municipal Liability for Torts, §§ 16, 17; 20 Am. & Eng. Ency. Law (2nd ed.), 1203. In such case the board represents the State and exercises its sovereignty; it is not the agent of the municipality. That the duties confided to the board in question were for the interest of the general public and might equally well have been left to a board appointed by the state government, or even to a state officer, is illustrated by other provisions in our laws. . . . This is a matter of general public concern of the same nature as the condemnation and removal of dangerous, decayed and inflammable structures; and it is obvious that in either case the police power of the State is exercised, and the authority which the State sets up to wield that power represents the sovereignty of the State. Such has been the general course of decisions with respect to boards so constituted," per Pound, C.

87. Wood v. City of Hinton, 47 W. Va. 645, 35 S. E. 824, per Dent, J.

remove or abate nuisances can only act in such a manner as will effectuate the purpose for which the powers are conferred. It cannot unwarrantably invade the right of private property. If the nuisance consists in the use to which a structure is put, and not in the structure itself, its destruction as a means of abating the nuisance will not be justified,[88] as the right of property of an individual in a building so misused, is one which is recognized and protected by the constitution and laws.[89] So where a nuisance consists in the uses of a building for the purpose of storing rubbish, a municipality will not be justified in ordering the destruction of the building.[90] And where a house is used as a house of ill-fame, the nuisance consists of the use to which it is put, and a municipality in the exercise of its power to remove or abate nuisance cannot destroy the house, as the nuisance can be abated by preventing the use for such purpose.[91] And where a proceeding was brought under the consolidation act in New York[92] for the purpose of condemning certain building in New York city, it was alleged substantially that the buildings sought to be condemned were in such a condition as to be dangerous to public health, and that they were not reasonably capable of being made fit for human habitation and occupancy, and that the evils caused by such buildings could not be remedied in any other way than by their destruction. It appeared that these buildings were five-story tenements, constructed so close to an adjacent building owned by another as to deprive both buildings of proper ventilation, that they were damp and were filled with filth and vermin, that foul odors came therefrom which were almost unendurable, that they were inhabited by over a hundred families, that the air in the rooms was foul and unfit to breathe, and that the death rate was about twice the normal rate

88. Nazeworthy v. Sullivan, 55 Ill. App. 48; Brightman v. Inhabitants of Bristol, 65 Me. 426, 20 Am. Rep. 711; Allison v. Richmond, 51 Mo. App. 133; Barclay v. Commonwealth, 25 Pa. 503, 64 Am. Dec. 715; Miller v. Burch, 32 Tex. 209, 5 Am. Rep. 242. As to right of individual in such cases, see chap. 16, subd. 2, herein.

89. Miller v. Burch, 32 Tex. 209, 5 Am. Rep. 242.

90. Allison v. Richmond, 51 Mo. App. 133.

91. Welch v. Stowell, 2 Dougl. (Mich.) 332; see Ely v. Supervisors of Niagara County, 36 N. Y. 273; Moody v. Supervisors of Niagara County, 46 Barb. (N. Y.) 659.

92. Laws of 1882, ch. 410.

and was caused by diseases nourished by dampness and exposure to foul air. The referee found that they were unfit for habitation, but the appellate court declared that the testimony did not establish that they were not capable of being made fit for habitation or that the nuisance upon them could not be abated in any other way than by their destruction. It was said in this case: "Although the buildings may not have been capable of being fitted for habitation, still if they were so put in repair that the evil smells should be removed and the source of contagion taken away—as it is plain from the evidence might be done—the building would cease to be a nuisance, and the fact that they might not thereby be made fit for human habitation would not authorize their destruction. If they ceased to be in such a condition as to breed pestilence and spread disease, and were rendered innoxious, the owner of them had a right to have them remain upon the premises, even though he might not be permitted to use them as a tenement house. There are many other uses to which he might lawfully put them, and the undoubted power of the public to refuse him permission to rent them to be used for human habitation did not necessarily involve the right to destroy them if they were not fit for that purpose. . . The case, then, so far as the plaintiff is concerned, must stand upon the condition of these buildings themselves, and upon the fact that they were not capable of being put in such a condition that they would not be of themselves dangerous to public health. Unless that was made to appear, the right to destroy them did not exist. In such cases the right to condemn grows out of the right to destroy the building because it is a public nuisance and can be abated in no other way; and unless that is made to appear, there can be no final order for condemnation."[93] Again, where an action was brought under a statute to recover damages from a town for the destruction of a building by a mob, it was decided that evidence was not admissible to show that the business carried on in such building was a public nuisance on account of the noisome smells therefrom.[94] Where, however, officers of a municipality act out-

93. Health Department of City of New York v. Dassori, 21 App. Div. (N. Y.) 348, 355, 47 N. Y. Suppl. 641, per Rumsey, J.

94. Brightman v. Inhabitants of Bristol, 65 Me. 426, 20 Am. Rep. 711.

side the scope of their powers in the destruction of a building, it has been decided that they will not be liable in their corporate capacity for such act.[95] But it has been decided that a burgess may be personally liable for the destruction of a building as a nuisance when it was not one in fact.[96] And it has also been decided that the mayor of a city may be liable.[97]

§ 351. **Same subject—Right of owner of building to injunction.**—Though a municipality may have the power to destroy a building where it is a nuisance in itself yet it may be enjoined in an action by the owner of a building where the nuisance consists in the use of the building merely, from unlawfully destroying such building. As has been said in one case: "It would require a great stretch of judicial power for a court of equity to sanction the abatement of a building as a nuisance, when the building itself does not, but only its use, constitute the nuisance. The law will only permit the abatement of so much of a nuisance as is necessary to prevent the injury. It is only necessary to be rid of the persons who use the buildings for an unlawful or improper purpose, and the law affords ample remedies, by indictment and otherwise, to accomplish this purpose."[98]

§ 352. **Property destroyed as a nuisance—Owner no right to compensation.**—Where a municipality in the exercise of power possessed by it to abate a nuisance which endangers the public health or safety, rightfully destroys property which is a nuisance

95. Prichard v. Commissioners of Morganton, 126 N. C. 908, 36 S. E. 353 (holding that county commissioners authorized by the code to make rules, regulations, and by-laws for the prevention of the spread of contagious diseases had no power to burn a dwelling house in order to prevent the spread of smallpox, and that they were not liable in their corporate capacity in an action therefor. It was also held in this case that such power was not conferred by authority to destroy tainted furniture or other articles for the prevention of the spread of contagious diseases and that they were not liable in their corporate capacity in an action therefor unless they had acted negligently in the performance of their authorized duties.

96. Reed v. Seely, 13 Pa. Co. Ct. 529.

97. Fields v. Stokley, 99 Pa. St. 306, 44 Am. Rep. 109.

98. Bristol Door & L. Co. v. Bristol, 97 Va. 304, 308, 33 S. E. 588, per Harrison, J.

of this character, the owner thereof will not be entitled to compensation for the property so destroyed.[99] The constitutional provision requiring compensation to be made for property taken or damaged for public purposes does not apply to property rightly condemned and destroyed as a public nuisance because dangerous to health.[100] "Such destruction for the public safety or health, is not a taking of private property for public use, without compensation or due process of law, in the sense of the constitution. It is simply the prevention of its noxious and unlawful use, and depends upon the principles that every man must so use his property as not to injure his neighbor, and that the safety of the public is the paramount law. These principles are legal maxims or axioms essential to the existence of regulated society. Written constitutions presuppose them, are subordinate to them, and cannot set them aside. They underlie and justify what is termed the police power of the State." [101]

353. **Municipal liability for nuisance—Generally.**—A municipal corporation is subject to liability like an individual for a nuisance which it maintains or permits to be maintained upon property owned by it or under its control. It may in a particular case be relieved from liability as for a nuisance where it acts under express legislative authority in the doing of an act and strictly within the scope of the powers granted. Such authority, however, will not relieve a municipality from liability for a nuisance created by it in the careless, negligent, or improper exercise of the powers conferred.[102] So it has been decided that a municipality

99. Savannah v. Mulligan, 95 Ga. 323, 22 S. E. 621, 29 L. R. A. 303, 51 Am. St. R. 86; Theilan v. Porter, 14 Lea (Tenn.), 622, 52 Am. Rep. 173.

100. Dunbar v. Augusta, 90 Ga. 390, 17 S. E. 907, 44 Am. & Eng. Corp. Cas. 558. The court said: "To destroy property because it is a dangerous nuisance is not to appropriate it to a public use, but to prevent any use of it by the owner and put an end to its existence because it could not be used consistently with the maxim *sic utere tuo ut alienum non laedas*. In abating nuisances the public does not exercise the power of eminent domain, but the police poyer," per Bleckley, C. J.

101. Manhattan Mfg. & F. Co. v. Van Keuren, 23 N. J. Eq. 251, 255, per the Vice Chancellor.

102. City of Morrison v. Hinkson, 87 Ill. 587, 29 Am. Rep. 77; New Albany v. Slider, 21 Ind. App. 392, 52 N. E. 626; Thayer v. City of Bos-

will be liable for a nuisance consisting of the deposit of garbage and refuse matter near the residence of a person thereby causing him personal discomfort and expense.[103] And it has been declared that when the city, without the pretense of authority, and in direct violation of a statute, assumes to grant to a private individual the right to obstruct the public highway while in the transaction of his private business, and for such privilege takes compensation, it must be regarded as itself maintaining a nuisance as long as the obstruction is continued by reason of and under such license and it must be liable for all damages which may naturally result to a third party who is injured in his person or his property by reason or in consequence of the place of such obstruction in the highway.[104] So where a permit was granted by a city to individuals to use a street for a display of fireworks, thus creating a nuisance in the highway, it was decided that the city was liable for an injury to property caused by such display.[105] Again, where a

ton, 19 Pick. (Mass.) 511, 31 Am. Dec. 157; Baker v. City of Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421; Hart v. Union City, 57 N. J. L. 99, 29 Atl. 490; Brower v. City of New York, 3 Barb. (N. Y.) 254; People v. Corporation of Albany, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; Belton v. Baylor Female College (Tex. Civ. A.), 33 S. W. 680; Hughes v. Fond du Lac, 73 Wis. 380, 41 N. W. 407; see Mayor of Savannah v. Cullens, 38 Ga. 334, 95 Am. Dec. 398.

"Municipal corporations are liable for the improper management and use of their property to the same extent and in the same manner as private corporations and natural persons. Unless acting under valid special legislative authority, they must, like individuals, use their own so as not to injure that which belongs to another." 2 Dillon on Mun. Corp. (3rd ed.) § 985.

"It is well settled that a municipal corporation is liable for the damages sustained by a citizen in consequence of such corporation permitting such ground under its control to become a nuisance." City of Sherman v. Laugham (Tex., 1890), 13 S. W. 1042.

A petition should allege, in an action against a city to enjoin the maintenance of an alleged nuisance, which is not a nuisance *per se*, such facts as show with reasonable certainty that a nuisance will be brought into existence and that the petition will suffer injury unless the prayer for relief is granted. Dunn v. City of Austin, 77 Tex. 139, 11 S. W. 1125.

103. City of Sheppenville v. Bower (Tex. Civ. App.), 68 S. W. 833.

104. Cohen v. New York, 113 N. Y. 532, 21 N. E. 700, 10 Am. St. R. 506, per Beckham, J. As to municipal liability for nuisance in highway, see § 264, herein.

105. Speir v. Brooklyn, 139 N. Y.

nuisance was caused by the refuse dumped into the manhole of a sewer by persons whom the city had licensed to do such act it was decided the city could not escape liability therefor, as if it licensed its property to be used for the purpose indicated, that is, for the dumping of night soil into it, it must see to it that those who use it take such precautions that the use will not be made a nuisance.[105] And the fact that a municipality may be liable to indictment for

6, 34 N. E. 727, 54 N. Y. St. R. 416, 21 L. R. A. 641, 36 Am. St. R. 664, 44 Am. & Eng. Corp. Cas. 577.

The court said in this case: "The display was of considerable magnitude, and the explosives, especially the rockets, were heavily charged, and when exploded were carried with immense velocity. It was managed by private persons under no official responsibility and no municipal or public interest was concerned. Under the circumstances, in view of the place, the danger involved and the occasion, the transaction was an unreasonable, unwarranted, and unlawful use of the streets, exposing persons and property to injury, and was properly found to constitute a public nuisance. The court below adjudges that the City of Brooklyn is liable for the injury sustained by the plaintiff, and this is the only question in the case. That a municipal corporation may commit an actionable wrong and become liable for a tort is now beyond dispute. If the city directed or authorized the discharge of the fireworks which resulted in the injury complained of, it is, we think, liable. The inquiry is whether the City of Brooklyn did anything which, as to this plaintiff, placed it in the attitude of a principal in carrying on the display. The mayor of the city, its chief executive officer, expressly authorized it, assuming to act under an ordinance of the Common Council. In so doing and in construing the ordinance as authorizing him to grant a permit to private persons to use the public streets for the discharge of fireworks, he was following the practice which had long prevailed, and so far as appears no question had been raised that such permits were not within the ordinance. . . . The city had power to prohibit or regulate the use of fireworks within the city and to enact ordinances upon the subject. . . . If the permit was, in fact, authorized by the ordinance the city would, as we conceive, be liable, although the particular act authorized was wrongful. . . . But if the ordinance transcended the power of the Common Council in this respect, the misconstruction of the Common Council of the extent of its powers in dealing with the subject, which was concededly within its power of regulation, does not, we think, within any just view of municipal exemption from the consequences of unauthorized and wrongful acts of the governing body, exempt the city from liability." Per Andrew, C. J.

106. Kolb v. Mayor of Knoxville, (Tenn. S. C. 1903), 76 S. W. 823.

maintaining a nuisance will not affect its liability to an individual who has sustained a special injury thereby.[107]

§ 354. **Same subject—Distinction between powers ministerial and legislative.**—In determining the question of the liability of a municipal corporation, a distinction is made between those cases where it acts in the exercise of its governmental or legislative powers and those where it acts in the exercise of its private or ministerial powers. This distinction is well stated in a recent case in Virginia, where it is said: "A municipal corporation has a dual character, the one public and the other private, and exercises correspondingly two-fold functions, the one governmental and legislative and the other private and ministerial. In its public character it acts as an agency of the State, to enable it the better to govern that portion of the people residing within the municipality; and to this end there is granted to or imposed upon it, by the charter of its creation, powers and duties to be exercised and performed exclusively for public governmental purposes. These powers are legislative and discretionary and the municipality is exempt from liability for an injury resulting from the failure to exercise them, or from their improper or negligent exercise. In its corporate or private character there are granted unto it privileges and powers to be exercised for its own private advantage, which are for public purposes in no other sense, than that the public derives a common benefit from the proper discharge of the duties imposed or assumed in consideration of the privileges and powers conferred. This latter class of powers and duties are not discretionary, but ministerial and absolute; and for an injury resulting from negligence in their exercise or performance, the municipality is liable in a civil action for damages, in the same

107. Hart v. Union City, 57 N. J. L. 90, 29 Atl. 490, wherein it was said by the court: "This contention cannot prevail. We have not been pointed to any precedent extending exemption from liability to cases of active wrongdoing, nor are such precedents to be discovered. There is no reason arising out of public policy why municipal corporations should be shielded from liability when a private injury is inflicted by their wrongful acts, as distinguished from mere negligence. The grounds on which the exemption has been rested in the one class of cases are inapplicable to the other class." Per Magie, J.

manner as an individual or private corporation. The line of distinction between the two classes of powers and duties is clearly drawn by the courts and text writers, and the exemption of the municipality in the one case and its liability in the other for an injury resulting from negligence, firmly established."[108] So it has been declared that a municipal corporation which is authorized to make ordinances for the good government of its streets and citizens, and which passes such ordinances, is not liable for injuries resulting from their neglect or violation by private citizens or for its failure to strictly enforce them, as in such cases it acts in a legislative capacity.[109] And likewise the fact that a city, having power to enact ordinances to prevent a nuisance, fails to enact them will not render it liable in a suit at law.[110] It is, however, often a difficult question to determine, upon the particular facts of the

108. Jones v. City of Williamsburg, 97 Va. 722, 723, 34 S. E. 883, 47 L. R. A. 294 per Riley, J., citing 2 Dillon on Mun. Corp. (4th ed.) secs. 949, 966; City of Richmond v. Long, 17 Grat. (Va.) 375; Sawyer v. Corse, 17 Grat. (Va.) 230; Perry v. Richmond, 94 Va. 538.

"A recovery can be had against a municipal corporation only where it negligently performs or negligently fails to perform a duty in its nature ministerial and then only in cases where the ministerial duty is imposed by law." Anderson v. East, 117 Ind. 126, 19 N. E. 726, 2, L. R. A. 712 per Elliott, C. J.

Where duties are imposed on a municipality it must perform them and in an action for failure to perform them and thereby prevent a nuisance causing injury to the plaintiff, a failure to use the means at its disposal to prevent such consequences should be alleged. Threadgill v. Anson Co. Com'rs, 99 N. C. 352, 6 S. E. 189.

109. Leonard v. City of Hornellsville, 41 App. Div. (N. Y.) 106, 58 N. Y. Suppl. 266; Levy v. Mayor 1 Sandf. (N. Y.) 465. See, also, Howard v. City of Brooklyn, 30 App. Div. (N. Y.) 217, 51 N. Y. Suppl. 1058; Hubbell v. City of Veroqua, 67 Wis. 343, 30 N. W. 847.

110. "The act sued for is a nuisance under the facts stated. But not being the act of the city, it is the act of those who actually set up and maintained the pesthouse. It was thus a private nuisance, of the same legal character that the establishment of a slaughter house by individuals might be. It is admittedly true that the city could, by ordinance and prosecution, so punish perpetrators of nuisances within its jurisdiction as to prevent them. For a failure to enact and execute such ordinances will the city be liable? We are of the opinion that it will not. It would be a failure to discharge its political duties for which it is not liable to a suit at law." Arnold v. City of Stanford, 24 Ky. Law R. 626, 69 S. W. 726, per Judge O'Rear.

case, to which class a certain power belongs and therefore to decide whether a municipality, in a particular case, is liable or not.[111]

§ 355. **Municipal liability—Public works—Particular instances.**—Though a municipality is engaged in the construction or maintenance of a work which is for the public benefit, use or advantage, such fact will not relieve it from liability for a nuisance caused by the mode or manner of its construction or maintenance. A municipality in pursuing a public work, is not privileged to commit a nuisance to the special injury of a citizen, and if it does, it must, as would a private individual, respond in damages therefor.[112] So the fact that a wall built by a city, was maintained solely for public use, was held not to relieve the city from liability for a nuisance caused to an adjoining owner upon whose land it encroached.[113] So it has been declared that while the discretion of a county in the exercise of a governmental power such as the location and construction of a sewer can not be controlled by the courts unless a clear abuse of power is shown, yet such exemption can not be invoked to protect it in the exercise of its powers in such a manner as to commit a nuisance to the injury of individuals.[114] And though the maintenance in a proper manner by a municipality of a dump for garbage and refuse matter is an exercise of a proper municipal function and not a nuisance, yet if it is maintained in an improper manner so as to create a nuisance and cause injury to an individual the city will be liable therefor.[115]

111. Mayor of Dalton v. Wilson, 118 Ga. 100, 44 S. E. 830, 98 Am. St. R. 101.

112. Chattanooga v. Dowling, 101 Tenn. 342, 47 S. W. 700.

113. Miles v. Worcester, 154 Mass. 511, 28 N. E. 676, 13 L. R. A. 841, 26, Am. St. R. 264, in which it was declared that public use did not justify the nuisance, and that if more land were needed it should be taken in the regular way and compensation given.

114. Pierce v. Gilson County, 107 Tenn. 224, 64 S. W. 33; see City of Waycross v. Houk, 113 Ga. 963, 39 S. E. 577.

115. City of Denver v. Porter, 126 Fed. 288, 61 C. C. A. 168.

Coming to nuisance. The fact that the city purchased the land and designated it as a place for dumping refuse matter before the plaintiff located in its vicinity will not relieve the city from liability to him for an injury sustained by him owing to the negligent manner in which it was conducted. Sherman v. Langham, (Tex.), 13 S. W. 1042, 30 Am. & Eng. Corp. Cas. 539.

And it has been decided that it is the undoubted right of a municipal corporation to grade its streets or change the grade when it deems it necessary so to do, and the property owners have no ground of complaint even though the consequences be that surface water is thrown upon the land, or caused to flow thereon in larger quantity than formerly, or is prevented from flowing therefrom or is collected thereon. But no right exists to collect a material body of water by diverting it from its natural flow, or by other means to gather it together, and when thus collected to conduct it by any artificial channel and discharge it in a body upon private property.[116]

§ 356. **Same subject continued.**—Legislative authority to a municipaliy to build a pumping station for its waterworks, but which does not designate the site, does not authorize its location so near to the premises of an individual as to render buildings subsequently erected thereon untenantable on account of the noise and vibration. The legislature will not in such a case be presumed to have authorized an invasion of private rights amounting to a nuisance.[117] And likewise a municipality may be held responsible

Possession and control sufficient to render a city liable for a nuisance is shown by the fact that the place was designated by ordinance to be used for such purpose, that the land was taken possession of by the city, and that by ordinance the use of the land by others was prohibited and the city scavenger directed to deposit garbage thereon. Fort Worth v. Crawford, 74 Tex. 404, 12 S. W. 52, 15 Am. St. R. 840.

The New York City Consolidation Act, sec. 706, by which the street commissioner was authorized to use city piers for the shipment of garbage and refuse did not authorize the construction by the city on a public pier owned by it and an individual in severalty of a dumping board so as to impair the use by the individual of his half of the pier or to create a nuisance by dumping garbage on the dumping board. Hill v. New York, 139 N. Y. 495, 34 N. E. 1090, 54 N. Y. St. R. 797.

116. Carll v. Northport, 11 App. Div. (N. Y.) 120, 42 N. Y. Suppl. 576. See, also, Lynch v. Mayor, 76 N. Y 62; McCarthy v. Far Rockaway, 3 App. Div. (N. Y.) 381. See, Commissioners of Kensington v. Wood, 10 Pa. St. 93, 49 Am. Dec. 582 holding that the commissioners of a district who are authorized to grade and pave a public street, are liable for injuries accruing to a private right of way down which the water from the street is thereby diverted, as they are bound to make proper provisions for carrying off the waste water.

117. Morton v. New York, 140 N.

where a hospital is wrongfully located or conducted by it or is operated in an unwarranted manner or without due care and skill.[118] So, again, where a nuisance was caused by the defective construction of a privy vault of a school house which belonged to a city it was held that the city was liable in damages for such nuisance.[119] But where the municipality is not the erector or custodian of public school buildings within its limits and has no control over such buildings or the land on which they are erected it has been decided that it is not liable as the creator or continuer of a nuisance resulting from defects in such a building.[120]

§ 357. Liability of municipality where it fails to remove or abate nuisance.—Where the duty is imposed upon a municipality of removing or abating nuisances which are public in their charac-

Y. 207, 35 N. E. 490, 55 N. Y. St. R. 413, 22 L. R. A. 241, 44 Am. & Eng. Corp. Cas. 568, affirming 65 Hun. (N. Y.) 32, 19 N. Y., Suppl. 603, 47 N. Y. St. R. 64. See Chap. VI. herein as to legalized nuisances.

118. Deaconess Home & Hospital v. Bontjes, 104 Ill. App. 484. See Frazer v. City of Chicago, 186 Ill. 480, 57 N. E. 1055.

A county erecting and maintaining a pesthouse for the treatment of persons infected with malignant disease is liable to an individual, where the pesthouse is located so near to his dwelling that his premises become unhealthy and infected with the same disease and the occupancy thereof is rendered unpleasant and unsafe. Haag v. Board of Commissioners of Vanderburgh County, 60 Ind. 511, 28 Am. Rep. 654.

119. Briegel v. Philadelphia, 135 Pa. St. 451, 19, Atl. 1038, 20 Am. St. R. 885, 28 W. N. C. 253, 30 Am. & Eng. Corp. Cas. 501. Mr. Justice Mitchell said in this case: "In the class of cases to which the present belongs, injuries arising from the misuse of land, there has never been any substantial hesitation in holding cities liable. The ownership of property entails certain burdens, one of which is the obligation of care that it shall not injure others in their property or persons, by unlawful use or neglect. This obligation rests, without regard to personal disabilities, on all owners alike, infants, femes coverts, and others, by virtue of their ownership, and municipal corporations are not exempt. The general rule is thus stated: 'Municipal corporations are liable for the improper management and use of their property, to the same extent and in the same manner as private corporations and natural persons. Unless acting under valid special legislative authority, they must, like individuals, use their own so as not to injure that which belongs to another.' 2 Dillon Mun. Corp. 3rd ed. sec. 985."

120. Perry v. Mayor of City of New York, 8 Bosw. (N. Y.) 504.

ter and it fails to perform such duty, it will be liable in damages to one who is injured in consequence of such failure.[121] So it has been decided that power conferred on a city by its charter to remove, or cause to be removed, any buildings, posts, steps, fences or other obstructions, or nuisance, in the public streets, lanes, alleys, sidewalks or public squares of the city, is a power conferred for the public good and that the municipality is bound to keep the streets, lanes, alleys and sidewalks in such condition that it is safe and convenient to pass over and along them, and that in case of failure it is liable to the one injured by its neglect. In this case it was decided that a two story brick wall, of a building burned down some time previous, standing immediately upon the edge of the sidewalks, and which was insecure and endangered the lives of people passing was a nuisance which it was the duty of the municipality to abate, and having failed to do so it was liable in damages to one injured by its falling.[122]

§ 358. **Same subject continued.**—The failure, however, of a municipal corporation to provide the means of abating a nuisance upon private property not affecting a street or highway or the omission to abate it when the means are furnished gives no right of action to one who may be injured thereby.[123] And the rule is

121. Baker v. City of Boston, 12 Pick. (Mass.) 184, 22 Am. Dec. 421; Raymond v. City of Lowell, 6 Cush, (Mass.) 524, 53 Am. Dec. 57; People v. Corporation of Albany, 11 Wend. (N. Y.) 539, 27 Am. Dec. 95; Fort Worth v. Crawford, 74 Tex. 404, 12 S. W. 52.

122. Parker v. Mayor of Macon, 39 Ga. 725, 99 Am. Dec. 486. See, also, Grogan v. Broadway Foundry Co., 87 Mo. 321, in which the court says in a similar case that "whenever it is discovered by the officers of the city that a structure exists in the sides of one of its streets, so unsafe as to endanger the lives or persons of those passing over and along the street, the duty either to remove it or to make it safe and secure, at once arises, and this duty cannot be shifted from the city to another so as to relieve it from liability for injuries occasioned by it." Per Morton, J. Compare Davis v. Montgomery, 51 Ala. 139, 23 Am. Rep. 545.

123. Davis v. Montgomery, 51 Ala. 139, 23 Am. Rep. 545; James v. Harrodsburg, 85 Ky. 191, 3 S. W. 135, 7 Am. St. R. 589; City of Frankfort v. Commonwealth, 25 Ky., Law Rep. 311, 75 S. W. 217; Leonard v. Hornellsville, 41 App. Div. 106, 58 N. Y. Suppl. 266. See, also, Anderson v. East. 117 Ind. 126, 19 N. E. 726, 2 L. R. A., 712; Home v. City of New Orleans, 12 La. Ann. 481; McSrowell v. Town of Bristol, 5 Lea (Tenn.) 685.

declared to be well settled that no action for damages will lie against a municipal corporation for failure to abate a nuisance maintained by a private individual upon private property, where such nuisance in no way amounts to an obstruction of a public street or in any way imperils the safety of travelers upon the street.[124] So where the common council of a city is authorized by its charter to pass ordinances for the raising or demolishing of buildings which as a result of fire "may become dangerous" the power so conferred has been declared to be one merely of local legislation, and it is decided that it is not liable for a failure to exercise the power, for injuries sustained by one on adjoining premises which were caused by the falling of the wall of a building which had become dangerous by reason of fire.[125] And where a water station was erected by a municipality in a street and a building was injured by the negligent use of water at such station it was decided that the municipality was not liable in damages for such injury, by reason of its failure to exercise the power conferred upon it to abate such station as a nuisance, it being declared that the streets were not thereby rendered unsafe and that the power conferred was a governmental power, a failure to exercise which did not render the city liable.[126]

124. Mayor of Dalton v. Wilson, 118 Ga. 100, 44 S. E. 830, 98 Am. St. R. 101, holding that in such a case the remedy is an action for damages against the one maintaining the nuisance.

125. Cain v. City of Syracuse, 95 N. Y. 83.

126. Greenville v. Britton, 19 Tex. Civ. App. 79, 45 S. W. 970.

CHAPTER XVI.

Remedies—Nature and Form of Remedy.

Section 359. Nature and form of remedy generally.
360. Nature and form of remedy continued—Ancient or common-law remedies.
361. Nature and form of remedy continued—Debt, nuisance, ejectment, case, trespass.
362. Nature and form of remedy continued—Statutes.
363. Nature and form of remedy continued—Law and equity.
364. Nature and form of remedy continued—Effect of prayer for relief—Election of remedy.
365. Remedy by indictment and in equity—Statutes.
366. Same subject continued.
367. Same subject continued.

§ 359. **Nature and form of remedy generally.**—Remedies in case of a nuisance are public and private, civil and criminal, and action or suit may be brought in law or equity, or a criminal proceeding may be instituted, depending, but not exclusively so, upon the nature and kind of nuisance. There also exists a right in certain cases to summarily abate a nuisance. These matters will be fully considered in the following sections. But in order to conclusively settle the question whether or not a nuisance exists resort must be had to the established courts of the land.[1]

§ 360. **Nature and form of remedy continued—Ancient or common law remedies.**—The old common law remedies were two: (1) *Quod permittat prosternere.* This was in the nature of a writ of right and therefore subject to great delays. It commanded the defendant to permit the plaintiff to abate the nuisance, or show cause against the same; and plaintiff could have judgment to abate the nuisance, and for damages against the defendant. (2) An

1. Hutton v. City of Camden, 39 N. J. L. (10 Vroom) 122, 23 Am. Rep. 203.

assize of nuisance, in which the sheriff was commanded to summon a jury to view the premises, and, if they found for the plaintiff, he had judgment to have the nuisance abated and for damages. Both had long been out of use in Blackstone's day. In the assize of nuisance the jury were to view the premises; this may be done now in the case at law, where the statute so provides at the request of either party.[2] If one elects to abate a private nuisance he cannot afterwards maintain an assize of nuisance, the judgment

2. Powell v. Bentley, 34 W. Va. 804, 808, 12 S. E. 1085, 12 L. R. A. 53, per curiam. See, also, Barnet v. Ihric, 17 Serg. & R. (Pa.) 174; Cornes v. Harris, 1 N. Y. (1 Comst.) 223; Ellsworth v. Putnam, 16 Barb. (N. Y.) 565.

"**The remedies by assize of nuisance, and quod permittat prosternere** have been out of use in England for two or three centuries. . . . The assize of nuisance is an existing remedy in Pennsylvania; but the courts have found it necessary to disregard the ancient forms and adapt the action to modern practice." Kintz v. McNeal, 1 Denio (N. Y.), 436.

"**The ancient remedy for an abatement** of a nuisance was a writ of nuisance or assize of nuisance. This writ is now obsolete in England, but unless it has been abolished by statute, it may be regarded as theoretically in force in the United States. But the courts will not look with favor upon the use of it, and will exact a strict compliance with all requirements of the ancient practice in case it is resorted to." Farnham on Waters and Watercourses (Ed. 1904), § 987a, p. 2815.

"**The old common-law remedy for nuisance** formerly was by assize of nuisance, the office of which was two-fold: First, for an abatement of the nuisance, and, second, for damages; and where this remedy still exists it may be brought, and under it an order for abatement may be obtained. Prior to the existence of this remedy the party injured was obliged to proceed by writ of *quod permittat prostenere*, under which the defendant was required to show cause, why the plaintiff should not be permitted to abate the nuisance, but this remedy was found to be too complicated and slow, and it gave place to the writ of assize of nuisance, but both of those remedies have become obsolete and given place to an action on the case, under which an abatement cannot be ordered, unless as previously stated, provision therefor is made by statute. Of course, unless taken away by statute, these remedies may be resorted to, but being obsolete proceedings, the courts will not relax the strictness of the ancient practice." Wood on Nuisances, 3rd Ed. § 843.

That jury may view alleged nuisance, see Smith v. Morse, 148 Mass. 408, 19 N. E. 393.

in which, if for the plaintiff, should be for an abatement of the nuisance.[3]

§ 361. **Nature and form of remedy continued—Debt, nuisance, ejectment, case, trespass.**—An action of debt will not be sustained for keeping a nuisance which is a criminal offense both by statute and at common-law;[4] although a city may maintain an action of debt to recover a statutory penalty imposed for its benefit.[5] So nuisance and not ejectment is the proper remedy for an encroachment on land by the projection of eaves and gutters.[6] And an action on the case lies for a nuisance affecting the health of plaintiff and his family and occasioned by the erection of a mill-dam.[7] So the damage to a lower riparian owner by the pollution of a stream being neither intentional, direct nor immediate, but consequential, an action to recover for such damages must be in case, and not trespass.[8]

§ 362. **Nature and form of remedy continued—Statutes.**—If a statute provides for a fine for a person who erects or maintains a public nuisance to the injury of any part of the citizens of the State the statute controls.[9] And where a statutory provision allows a civil action to enjoin and abate a nuisance such authorization is discretionary and not mandatory as to a private action by the injured party.[10] So an action for the abatement of a nuisance and for damages may, where the statute so provides, be brought either at law or in equity according to the procedure in

3. Tate v. Parrish, 7 T. B. Mon. (23 Ky.) 325.

4. City Council of Indianapolis v. Blythe, 2 Ind. 75.

5. Rockland v. Farnsworth, 87 Me. 473, 32 Atl. 1012, Rev. Stat. Chap. 14, § 16.

6. Aiken v. Benedict, 39 Barb. (N. Y.) 400.

7. Story v. Hammond, 4 Ohio, 376.

8. Drake v. Lady Ensley Coal Iron & R. Co., 102 Ala. 501, 14 So. 749, 24 L. R. A. 64, 48 Am. St. Rep. 77

9. Moses v. State, 58 Ind. 185, 186.

Exclusive remedy. Compare, however, § 365 herein.

Statutory remedy followed—equitable relief denied. See City of Pittsburgh v. Nicholson, 36 Pitts. Leg. J. N. S. 185, given under § 415, note 1, herein.

10. Downing v. Oskaloosa, 86 Iowa, 352, 53 N. W. 256.

vogue under a prior statute, and where plaintiff elected to bring his action in equity it was error for the court on defendant's motion to transfer it to the law docket and compel plaintiff to try it as an ordinary action.[11] Again, a statute which authorizes a city to fill up low lots and grounds therein, the purpose of said act being to promote and secure the health of the city is a clear case of the exercise of the police power; such an enactment is constitutional and a rightful delegation of police power to the city and a proceeding to compel such low lands to be filed up may properly be brought and need not be conducted in the manner of statutory provisions as to condemnation of lands.[12] So an ordinance of a town, which prohibits the obstruction of waterway, so that the water shall accumulate in any street and which thereby prevents a nuisance, is not invalid because the offense of creating a nuisance is cognizable under the general laws of the State, for the mere obstruction of a waterway is not necessarily a nuisance.[13]

§ 363. **Nature and form of remedy continued—Law and equity.**—An action for damages for maintaining a private nuisance may be brought in a court of law;[14] and an injunction is properly a remedy to prevent or restrain an injury.[15] So the equitable remedy may be more effective,[16] since a court of chancery has power to prevent as well as to remedy existing evils. But such power should be exercised with caution;[17] so in an equitable suit the parties' rights may be determined if it is clear that he is entitled to relief;[18] but it must appear that a necessity exists for the in-

11. Gribben v. Hansen, 69 Iowa, 255, 28 N. W. 584. Reed, J., said: "Plaintiff had the election to prosecute his action either in law or in equity, and having brought it in a court of equity, he had a right to have it tried in the manner prescribed by the statute for the trial of equitable actions."

12. Charleston v. Werner, 38 S. C. 488, 37 Am. St. Rep. 776, 17 S. E. 33, 41 Am. & Eng. Corp. Cas. 392.

13. State v. Wilson, 106 N. C. 718, 11 S. E. 254.

14. Crawford v. Atglen Axle & Iron Mfg. Co., 1 Chest. Co. Rep. 412.

15. Attorney-General v. New Jersey R. & T. Co., 3 N. J. Eq. 136. See, also, Carlisle v. Cooper, 18 N. J. Eq. 241.

16. Kothenberthal v. Salem Co., 13 Oreg. 604.

17. Peck v. Elder, 3 Sandf. (8 N. Y. Super. Ct.) 126.

18. Carlisle v. Cooper, 18 N. J. Eq. 241.

tervention of equity, otherwise no relief will be granted.[19] Courts of equity have concurrent jurisdiction with courts of law in cases of private nuisance, but it is not every case of nuisance which will authorize the exercise of equity jurisdiction. It rests upon the principle of clear and undoubted rights to the enjoyment of the subject in question, and it will only be exercised in case of strong and imperious necessity.[20] So it is held in Vermont that a remedy to abate a nuisance, if there is no other objection, may well exist both at law and in equity.[21] And a continuing nuisance by polluting the waters of a stream may be proceeded against at law or in equity at the election of the party injured.[22]

§ 364. **Nature and form of remedy continued—Effect of prayer for relief—Election of remedy.**—It is held that the prayer for equitable relief does not change the nature of an action for damages which is legal and make it equitable.[23] So the prayer of a complaint may demand two kinds of relief, one equitable, the other legal, and it is not error to refuse to require the plaintiff to elect whether he will proceed for damages or for an injunction.[24] "Causes of action are very often confounded with remedies, and being regarded as synonymous, the rules established with reference to the one are sometimes supposed to be applicable to the other. This, however, is a mistaken view of the subject, as a brief investigation will show. A cause of action may be defined in general terms to be a legal right, invalid without justification or sufficient excuse. Upon such invasion a cause of action arises, which entitles the party injured to some relief, by the application

19. State v. O'Leary, 155 Ind. 526, 58 N. E. 703, 52 L. R. A. 299. See, also, Fisk v. Wilbur, 7 Barb. (N. Y.) 395. See § 415 *et seq.*, herein as to requisites for relief.

20. Fisk v. Wilbur, 7 Barb. (N. Y.) 395.

21. State v. Martin, 68 Vt. 93, 34 Atl. 40.

22. City of Kewanee v. Otley, 204 Ill. 402, 408, 68 N. E. 388; Barton v. Union Cattle Co., 28 Neb. 250.

The jurisdiction of a court of equity to enjoin a continuing nuisance and compel its abatement is well settled. Nixon v. Boling (Ala. 1906), 40 So. 210.

23. Hellams v. Switzer, 24 S. C. 39.

24. Emory v. Hazard Powder Co., 22 S. C. 476, 480, 481, 53 Am. Rep. 730. See West Muncie Strawboard Co. v. Slack (Ind.), 72 N. E. 879.

of such remedies as the law may afford. But the cause of action and the remedy sought, are entirely different matters. The one precedes and, it is true, gives rise to the other, but they are separate and distinct from each other, and are governed by different rules and principles. It is true that the motive which prompts the action is a desire for relief, and to obtain this relief is the object of the action, and in this sense the relief sought is the cause of the action; but this is not the legal sense of the phrase 'cause of action.' On the contrary, that sense is as stated above; *i. e.*, a breach of one's legal rights." [25]

§ 365. **Remedy by indictment and in equity—Statutes.**—A public nuisance may as to the party and the remedy be a private nuisance.[26] But while a public nuisance is the subject of indictment, yet individuals aggrieved may have an action on the case, and a court of equity has jurisdiction in a proper case to decree that a nuisance be abated.[27] So where plaintiff has sustained a special injury both to his health and property from the same cause or nuisance he is entitled not only to compensation for damages thereby occasioned, but also to such judgment or injunction as will prevent further perpetration of the wrong.[28] But it is held that equity has no jurisdiction over common or public nuisances;[29] the remedy by indictment, however, is not exclusive of the rights of one who has suffered special injury different in kind from that of the public.[30] And equity may in a proper case take cognizance

25. Emory v. Hazard Powder Co., 22 S. C. 476, 481, 53 Am. Rep. 730, per Simpson, C. J.

26. Yuba County v. Kate Hayes Min. Co., 141 Cal. 360, 74 Pac. 1049.

27. Ronayne v. Loranger, 66 Mich. 373, 33 N. W. 840, 10 West. Rep. 523.

28. Chapman v. City of Rochester, 110 N. Y. 273, 276, 277, 18 N. Y. St. R. 133, 1 L. R. A. 296, 6 Am. St. Rep. 366.

29. Higgins v. City of Princeton, 8 N. J. Eq. 309.

30. Seifried v. Hays, 81 Ky. 377, 50 Am. Rep. 167; Gates v. Blincoe, 2 Dana (Ky.), 158, 26 Am. Dec. 440; Van Bergen v. Van Bergen, 2 Johns. Ch. (N. Y.) 272; Hellams v. Switzer, 24 S. C. 39. See Mechling v. Kittining Bridge Co., 1 Grant's Cas. (Pa.) 416. See Chap. XIX, herein as to special injury.

Equity has jurisdiction of indictable nuisance at instance of individual injured as in case of a bawdy house of ill repute. Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513.

of public nuisances and grant relief.[31] So a proceeding in equity to enjoin a liquor nuisance is purely civil in its character, being a proceeding to fix the status of the property; and the fact that the nuisance is also a breach of the criminal law does not make the proceeding criminal.[32] And a petition for an injunction under the nuisance act of New Hampshire relating to liquor nuisances is a civil proceeding, and being such the questions at issue are to be determined upon the balance of probabilities.[33]

§ 366. **Same subject continued.**—If an action is to be regarded as both legal and equitable in its character it may be maintained by the people of the State through the attorney-general for the removal of a nuisance and for an injunction restraining its continuance and for damages and an objection that an indictment or information is the only remedy will not be sustained,[34] and in such case the action to enjoin may be brought in the name of the State.[35] A remedy by indictment is, however, also appropriate, although there is a statutory civil remedy,[36] especially where the

31. Robinson v. Baltimore & O. R. Co., 129 Fed. 753 (dumping coal at siding and station and suspending freight business); Lang v. Merwin, 99 Me. 486, 59 Atl. 1021, 105 Am. St. Rep. 293 (slot machine in cigar store); Carleton v. Rugg, 149 Mass. 550, 22 N. E. 55, 5 L. R. A. 193; Rowe v. Granite Bridge Corp., 21 Pick. (38 Mass.) 344; Pittsburg v. Epping-Carpenter Co. (Pa.), 29 Pitts. L. J. N. S. 255; Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513 (bawdy house, suit by private citizen); Attorney-General v. Cleaver, 18 Ves. 211 (offensive trade, information filed at relation of several inhabitants to restrain same); Soltau v. De Held, 2 Sim. N. S. 150 (bill may be filed to restrain public nuisance without making attorney-general a party, if plaintiff sustains special damage). See Davis v. Auld, 90 Me. 559, 53 Atl. 118 (liquor nuisance).

Civil action on behalf of public will lie if nuisance is public. Board of Health v. Cotton Mills, 46 La. Ann. 806, 15 So. 164.

32. State v. Collins, 74 Vt. 43, 52 Atl. 69; Acts 1898, No. 90, § 2.

33. State, Thorndike v. Collins, 68 N. H. 299, 44 Atl. 495; Pub. Stat. c. 205, §§ 4, 5.

34. People v. Metropolitan Telephone & Telegraph Co., 11 Abb. N. C. (N. Y.) 304, 313, 64 How. Pr. (N. Y.) 120, 123, relying upon People v. Vanderbilt, 26 N. Y. 287; People v. Corporation of Albany, 11 Wend. (N. Y.) 539, 543.

35. Reaves v. Territory, 13 Okla. 396, 74 Pac. 951, under Wilson's Stat. 1903, § 4440.

36. St. Louis, A. & T. Ry. Co. v. State, 52 Ark. 51, 11 S. W. 1035.

statute so authorizes.[37] Again, although a party may be convicted of a public nuisance, still the nuisance may be abated or destroyed.[38] And where the penal code declares various acts bearing upon the pollution of streams of water of a certain class to be a misdemeanor such provision may have a bearing in a prosecution by the State under the code, but in litigation involving the abatement of a nuisance it has no direct bearing.[39] So the fact that certain acts are made a misdemeanor by the penal code and punishable as such, does not make them less a nuisance, nor imply that the legislature intended to make the criminal remedy exclusive of the civil.[40] And if a statute defines what are nuisances and prescribes a remedy by action, nevertheless any common law remedy in the abatement of nuisances which the statute does not embrace is not taken away.[41] But a statute may also so provide for a remedy by civil action for damages as to exclude a criminal prosecution.[42] Again, the remedy provided in Georgia Act. Dec., 1899, for abating by injunction as a public nuisance a "blind tiger," is cumulative of other remedies, provided by State laws, and may be made available even in a case where the other remedies are themselves complete and adequate.[43] So it is held in Indiana that the fact that a nuisance is a misdemeanor and punishable as such does not make the criminal exclusive of the civil remedy.[44] And the power conferred by statute upon incorporated towns to declare and abate nuisances does not exclude a resort to the courts for such purpose, but where there are concurring

37. Davis v. Auld, 96 Me. 559, 53 Atl. 118.

38. Woods v. Cottrell (W. Va.) , 65 L. R. A. 616, 47 S. E. 275. Examine State v. McMaster (N. Dak.), 99 N. W. 58.

39. Spring Valley Waterworks v. Fifield, 136 Cal. 14, 68 Pac. 108; Penal Code, § 374, Civ. Code, §§ 3479, 3493.

40. People v. Truckee Lumber Co., 116 Cal. 397, 39 L. R. A. 581, 58 Am. St. Rep. 183, 48 Pac. 374.

41. Stiles v. Laird, 5 Cal. 121, 63 Am. Dec. 110.

42. Eaton v. People, 30 Colo. 345, 70 Pac. 426; Mills Annot. Stat. §§ 1357, 3960, 3963.

43. Legg v. Anderson, 116 Ga. 401, 42 S. E. 720.

44. State v. Ohio Oil Co., 150 Ind. 21, 38, 41, 49 N. E. 809, 47 L. R. A. 627, per McCabe, J. See, also, Port of Mobile v. Louisville R. R. Co., 84 Ala. 115, 126, 4 So. 106, 5 Am. St. Rep. 342; People v. Truckee Lumber Co., 116 Cal. 397, 48 Pac. 374; Cranford v. Tyrrell, 128 N. Y. 341, 344, 28 N. E. 515.

effectual remedies, the choice and uninterrupted prosecution of one excludes the other.[45]

§ 367. **Same subject concluded.**—If the method contemplated by the statute to abate a nuisance in the name of a city is by ordinance and criminal prosecution a civil action will not lie at the instance of an individual not authorized to bring an action for the benefit of the public, for if the statute so contemplates, the abatement is to be effected by the direct action of an ordinance rather than by equitable proceedings in court.[46] So in Iowa where the code so permits if a party sues for damages occasioned by a nuisance, he is entitled to have his damages assessed by a jury, notwithstanding he may seek in the same action to have the continuation of the nuisance enjoined.[47] And in Kentucky a use of property, which was at common law a nuisance, does not cease to be so because the same act is made an offense by statute, and a different punishment provided. The party creating the nuisance may be pursued under either the common law or statutory remedy.[48] So it is also held in Maine that the fact that the State by statute or by common law can proceed, and has proceeded by criminal prosecution to punish for the maintenance of a common nuisance does not prevent the legislature authorizing it to proceed in equity to restrain, enjoin or abate such nuisance, by the use of the equity writ of injunction and a statute conferring such jurisdiction is within the legislative power and is not prohibited by any provision of the constitution.[49] And under a New York decision the public remedy is ordinarily by indictment for the punishment of the offender wherein on judgment of conviction the removal or destruction of the thing constituting the nuisance, if physical and tangible, may be adjudged, or by bill in equity filed on behalf of the people. But the remedy by judicial prosecution, *in rem* or *in personam*, is not exclusive where the statute in a par-

45. American Furniture Co. v. Town of Batesville, 139 Ind. 77, 38 N. E. 408, 35 N. E. 682.

46. City of Ottumwa v. Chinn, 75 Iowa, 405, 39 N. W. 670. See § 415, note 1, herein.

47. Miller v. The Keokuk & Des Moines R. Co., 63 Iowa, 680, 16 N. W. 567.

48. Louisville & N. R. R. Co. v. Commonwealth (Super. Ct.), 16 Ky. L. Rep. 347.

49. Davis v. Auld, 96 Me. 559, 53 Atl. 118; Pub. Laws 1891, c. 98.

ticular case gives a remedy by summary abatement and the remedy is appropriate to the object to be accomplished.[50] So in Vermont a statute may provide that a court of chancery may abate a nuisance, although other statutes provide for its abatement by other means,[51] and in the same State the provision in a statute, which imposes a fine for placing any obstructions in a highway, to be recovered by a complaint made to a justice of the peace, is merely cumulative, and does not take away the remedy by indictment at common law.[52]

50. Lawton v. Steele, 119 N. Y. 227, 237, 29 N. Y. St. R. 581, 995, 23 N. E. 878, 7 L. R. A. 134, 41 Alb. L. J. 348, 16 Am. St. Rep. 813.

51. State v. Martin, 68 Vt. 93, 34 Atl. 40, holding that the later statute did not repeal by implication the earlier statute.

52. State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560.

CHAPTER XVII.

Remedies Continued—Right to Abate.

Section 368. Right to abate public nuisance generally.
369. Same subject—Qualifications of right.
370. Same subject—Necessity of special injury to individual.
371. Instances of right to summarily abate by individual.
372. Abatement by municipality.
373. Nuisances on public lands—Power of Congress to order abatement.
374. Right of individual to summarily abate private nuisances.
375. Same subject—When right may be exercised.
376. Limitations on right to abate.
377. Same subject continued—Buildings and structures.
378. Same subject continued—Other instances.
379. Right to summarily abate as affected by statute.
380. Right not affected by constitutional provisions for protection of property.
381. Cost of abating nuisance.

§ 368. **Right to abate public nuisances generally.**—While an indictment is ordinarily the remedy for a public nuisance yet it is a recognized right, derived from the common law, that an individual may summarily abate such a nuisance.[1] So it is said in a case

1. Harvey v. Dewoody, 18 Ark. 252; City of Denver v. Mullen, 7 Colo. 345, 3 Pac. 693; Brook v. O'Boyle, 27 Ill. App. 384; Ronayne v. Loringer, 66 Mich. 373, 33 N. W. 840, 10 West. 524; Manhattan Mfg. & F. Co. v. Van Keuren, 23 N. J. Eq. 251; Wetmore v. Tracy, 14 Wend. (N. Y.) 250, 28 Am. Dec. 525; Lancaster Turnpike Co. v. Rogers, 2 Pa. 114, 44 Am. Dec. 179. In McLean v. Matthews, 7 Ill. App. 602, it is said: "It is a settled principle of the common law, that whatever obstructs travel in public highways and navigable streams, is a common or public nuisance, which may be removed and abated by any of the king's subjects (4 Black Com. 167; Earp v. Lee, 71 Ill. 193). In Comyn's Digest (Tit. Action on the case for a nuisance, D. 4) it is said: 'If it be a common nuisance, as a gate erected across a highway, every one may throw it down.' In Bacon's Abridgement (Tit. Nuisance, 61) 'anyone may pull down or otherwise abate a common nuisance, as a new gate, or even a

in New Jersey that: "The right to abate public nuisances, whether we regard it as existing in the municipalities, or in the community, or in the hands of the individual, is a common law right, and is denied in every instance of its exercise from the same source, necessity. It is akin to destroying property for the public safety, in case of a devastating fire or other controlling exigency."[2] And again in a New York decision it is declared that: "The right of summary abatement of a nuisance without judicial process or proceeding was an established principle of the common law long before the adoption of our constitution, and it has never been supposed that this common law principle was abrogated by the provision for the protection of life, liberty and property in our State constitution, although the exercise of the right might result in the destruction of property."[3]

§ 369. **Same subject—Qualifications of right.**—A nuisance must exist before the cause of it can be abated.[4] And it has been decided that to authorize the abating of a nuisance the thing considered as such must be so at the time it is abated, it being no justification for the abatement thereof that it had been a nuisance and was likely to be so again.[5] This right of an individual to

new house, erected in a highway; for if one whose estate is prejudiced by a private nuisance may justify the entering into another's grounds and pulling down and destroying it, it cannot but follow, a portion, that any one may destroy a common nuisance.'" Per Wilson, J.

An injunction may be granted at the suit of the government against the continuance of a public nuisance consisting of an obstruction of interstate commerce, its right thereto not being precluded by the fact that it may abate such nuisance by force, it being declared that the right to use force does not exclude an appeal to the courts but that it is a matter of commendation that the government chose the latter remedy. In re Debs, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. R. 900.

2. Hutton v. City of Camden, 39 N. J. L. 122, 23 Am. Rep. 203, per Beasley, C. J.

3. Lawton v. Steele, 119 N. Y. 226, 235, 23 N. E. 878, 16 Am. St. R. 813, 7 L. R. A. 134, per Andrews, J.

4. The King v. Wharton, 12 Mod. *510 (case 842).

5. Gates v. Blincoe, 2 Dana (Ky.), 158, 26 Am. Dec. 440; Great Falls v. Worster, 15 N. H. 442. But compare Amoskeag M'f'g. Co. v. Goodall, 46 N. H. 53, wherein it is held that while the general rule is as stated in the text, yet that where a party can maintain an action for a nuisance, he

summarily abate or remove a nuisance is also subject to the qualification that in exercising his right he must act in a peaceable manner and without creating a breach of the peace.[6] "The right to abate a public nuisance belongs to every citizen, yet it cannot be lawfully exerted if its exercise involve a breach of the peace. When such is the case the party erecting the nuisance must be proceded against legally."[7] So it has been decided that where an obstruction in the highway constitutes a public nuisance an individual, who is incommoded thereby, will be guilty of a breach of the peace where he continues his attempt to remove it after such attempt has been resisted.[8] Again, though a person may have the right to remove a nuisance created by materials or property belonging to another, yet he has no right to take and appropriate such materials or property to his own use.[9]

§ 370. **Same subject—Necessity of special injury to individual.**—The right of an individual to abate a public nuisance is said in some cases to exist without regard to the question whether it is an immediate injury to him, on the ground that such a nuisance is deemed an injury to the whole community, every person in which is supposed to be aggrieved by it.[10] This view, however, is not generally accepted by the majority of the courts, and the doctrine which is recognized by the better authorities, and may be said to be the prevailing one, is that an individual acquires no right to summarily abate a public nuisance from the mere fact of its existence, but that to entitle him to so abate the same there must be some special injury to him.[11] As is said in a case in Iowa:

may enter and abate it although at the time it is causing but nominal and no actual damage.

6. Turner v. Lacy, 37 Or. 158, 61 Pac. 342; Johnson v. Maxwell, 2 Wash. 482, 27 Pac. 1071.

7. Day v. Day, 4 Md. 262, 270, per Le Grand, C. J.

8. State v. White, 18 R. I. 473, 28 Atl. 968.

9. Larson v. Furlong, 50 Wis. 681, 8 N. W. 1 (so holding in the case of a public nuisance created by a dock built into the waters of a lake on land which belonged to the state).

10. Gunter v. Geary, 1 Cal. 462, 466, per Bennett, J.; Gates v. Blincoe, 2 Dana (Ky.), 158, 26 Am. Dec. 440.

11. Coast Co. v. Spring Lake, 56

"This summary method of redressing a grievance, should be regarded with great jealousy, and authorized only in cases of particular emergency requiring a more speedy remedy than can be had by the ordinary proceedings at law. If the nuisance alleged in this case was sufficiently urgent to justify the defendants in redressing the wrong by their own power, without the more commendable resort to judicial authority, they should at least have confined their operations to the dam itself; and to such portions of it only as caused, and by dejection would have removed, the injurious effects alleged."[12] So it has been declared in a New York decision that "The general proposition has been asserted in text books and repeated in judicial opinions, that any person may abate a public nuisance. But the best considered authorities in this country and in England now hold that a public nuisance can only be abated by an individual where it obstructs his private right, or interferes at the time with his enjoyment of a right common to many, as the right of passage upon the public highway, and he thereby sustains a special injury."[13] And in a case in

N. J. Eq. 615, 618, 36 Atl. 821; Brown v. De Groff, 50 N. J. L. 409, 14 Atl. 219, 12 Cent. 818; Griffith v. McCollum, 46 Barb. (N. Y.) 561; Harrison v. Ritson, 37 Barb. (N. Y.) 301; Griffith v. Holman, 23 Wash. 347, 63 Pac. 239; Larson v. Furlong, 50 Wis. 681, 8 N. W. 1; Bateman v. Bluck, 18, Q. B. 870.

The right does not exist to remove a nuisance without judicial proceedings where there is no right of action to restrain or remove or to obtain damages in respect thereto. Priewe v. Fitzimmons & Connell Co., 117 Wis. 497, 94 N. W. 317.

In the case of an oyster house erected in a tidal river by an individual opposite villa lots owned by another it was decided that though it was a public nuisance, yet that the owner of such lots must show, to justify his tearing it down before it was used, that it was a private nuisance to him also and that merely because the building was unsightly was no justification for his act. Bowden v. Lewis, 13 R. I. 189, 43 Am. Rep. 21.

Where a dock was built into the waters of a lake the rule was also applied. Larson v. Furlong, 50 Wis. 681, 8 N. W. 1.

It has also been declared that if an individual can with reasonable care, notwithstanding the act complained of, enjoy the right or franchise belonging to him, he is not at liberty to destroy or interfere with the property of the wrong-doer. Harrower v. Ritson, 37 Barb. (N. Y.) 301.

12. Moffett v. Brewer, 1 Iowa, 348, 350, per Greene, J.

13. Lawton v. Steele, 119 N. Y. 226, 237, 23 N. E. 878, 7 L. R. A.

Wisconsin it is also said: "It seems to be now well settled by the great weight of authority, that a private person can neither maintain an action to prevent the erection of, or to abate a public nuisance, without alleging facts showing that he will suffer some special damage not common to the rest of the public by the erection of such nuisance, or, in an action to abate the same, that he has suffered some injury peculiar to himself and not common to the public. . . . It seems to us that it follows logically from this rule in regard to the maintenance of an action by a private person to prevent or abate a public nuisance, that if such private person undertakes to abate such public nuisance without action, in order to justify himself he must show that such nuisance was injurious to his private interests, and that he has suffered private damages, not common to the public, by the erection and continuance thereof."[14]

§ 371. **Instance of right to summarily abate by individual.**—The right of an individual to summarily abate or remove a public nuisance which causes a special injury to him has been recognized in the case of a dock;[15] of a dwelling house in certain instances;[16] and a bridge constructed, without right, across a navigable river.[17] And where a turnpike company having erected a toll house on land of another under license, in consideration of the user of the road by such owner, abandoned the house as a toll house and removed the gate it was decided that the house became a public nuisance and might be removed by any one injured.[18] And where a telephone pole was erected on a sidewalk in front of the

134, 16 Am. St. R. 813, per Andrews, J., citing Brown v. Perkins, 12 Gray (Mass.), 89; Mayor of Colchester v. Brooke, 7 Ad. & El. 339; Dimes v. Petley, 15 Ad. & El. 276; Fort Plain Bridge Co. v. Smith, 30 N. Y. 44; Harrower v. Ritson, 37 Barb. (N. Y.) 301.

14. Larson v. Furlong, 50 Wis. 681, 686, 8 N. W. 1, per Taylor, J.

15. Larson v. Furlong, 63 Wis. 323, 23 N. W. 584.

16. Meeker v. Van Rensselaer, 15 Wend. (N. Y.) 397 (recognizing such right where a dwelling house was, during a cholera epidemic, a nuisance to individuals residing near).

17. State v. Dibble, 49 N. C. 107.

18. Lancaster Turnpike Co. v. Rogers, 2 Pa. St. 114, 44 Am. Dec. 179.

premises of an abutting owner and no license for its erection was obtained as was required by a city ordinance it was decided that such owner was justified in cutting down the pole.[19] Where, however, one took title to land subject to an easement, by virtue of a reservation in the original deed, to construct a dam of a certain height, it was decided that he could not relieve himself from liability for a criminal prosecution for destroying a part of the dam by the claim that he had acted in the exercise of his right to abate a public nuisance.[20] And the right of an individual, in some cases, to abate or remove a public nuisance in the highway has been held not to apply to the case of a dam in a navigable river by which a shoaling in the river below was caused, where such dam was erected under special statutory authorization, and there was a special provision in the statute giving a full and adequate remedy in such cases. It was said by the court in this case: "The dam had been lawfully erected, upon proceedings had under the statute, and had been constructed by the authority of the legislature, which, anticipating that one of the results might be the shoaling of the river below the dam, had provided a full and adequate remedy against this by imposing upon the proprietors a certain duty in relation thereto, and, in case of a failure on their part for a certain length of time, upon a body of the public authorities, the harbor commissioners, representing the commonwealth, for whose expenditure the proprietors were afterwards bound to reimburse the commonwealth. The ground upon which a party may sometimes act in the removal of a nuisance, that, in the exercise of his right, he cannot wait for the slow processes of law, has here no application. The injury which the defendant sustained, in being unable to use the stream below, was immediately caused by neglect of the proper precautions for which the statute had provided, and which had resulted in the shoaling of the water. The remedy for this was not to destroy the structure, but to enforce, through the proper authorities, the provisions of law by which this injury to navigation below the dam had been antici-

19. York Telephone Co. v. Keesey, 5 Pa. Dist. R. 366.

20. State v. Suttle, 115 N. C. 784, 20 S. E. 725.

pated and guarded against, for, if we should concede the defendants proposition, that the proprietors would be indictable for a nuisance in failing to remove the shoaling occasioned by this bridge, would it by any means follow that one situated as the defendant claimed to be would be authorized to destroy it." [21]

§ 372. **Abatement by municipality.**—The power of a municipality to abate or remove public nuisances within its corporate limits is also generally recognized.[22] So such power has been held to exist in the case of electric wires by which human life is endangered;[23] lamp posts erected without authority and which obstruct the highways,[24] and a nuisance consisting of the pollution of the water supply of a city.[25] And where fishing nets are set in certain waters in violation of a statute declaring such nets to be nuisances they may likewise be destroyed in order to abate the nuisance.[26] Again, where a license granted by a city to erect

21. Commonwealth v. Tolman, 149 Mass. 229, 21 N. E. 377, 3 L. R. A. 747, per Devens, J.

22. See secs. 345 *et seq.*, herein.

An urban district council may under the English public health act of 1875, § 149, remove encroachments upon highways within its control without first taking proceedings summarily or by indictment against the person alleged to have encroached. Reynolds v. Urban District Council, (1896) 1 Q. B. 604, 65 L. J. Q. B. N. S. 400, 74 Law. T. 422.

The English Public Health Act of 1891, § 2, sub. 1, providing for the summary abatement of any watercourse or drain which is a nuisance is not applicable to public sewers. Fulham Vestry v. London County Council (1897), 2 Q. B. 76, 66 L. J. Q. B. N. S. 515, 76 Law T. 691.

23. United States Illum. Co. v. Grant, 55 Hun (N. Y.), 222, 27 N. Y. St. R. 767, 7 N. Y. Supp. 788 (holding that such wires may be removed by the department of public works as well as by the board of health).

24. New Orleans Gaslight Co. v. Hart, 40 La. Ann. 474, 4 So. 215, 8 Am. St. R. 544 (holding that a municipality may, in the exercise of its police power, remove lamp posts which have been erected by a gas company only empowered to lay gas mains).

25. Kelly v. New York, 6 Misc. R. (N. Y.) 516, 56 N. Y. St. R. 845, 27 N. Y. Supp. 164 (holding such power to be vested in the commissioner of public works).

26. Lawton v. Steele, 119 N. Y. 227, 29 N. Y. St. R. 581, 23 N. E. 878, 7 L. R. A. 134, 41 Alb. L. J. 348 (wherein it is declared that where a public nuisance consists in the location or use of tangible property so as to interfere with or ob-

electric lighting appliances in certain streets reserved the power to the city to revoke such license at will and to demand the removal of such appliances, it was decided that upon revocation of the license and failure of the one maintaining the appliances to remove them after notice the city authorities could summarily remove the same as they thus became nuisances *per se*.[27] And a code provision authorizing a municipality to abate a liquor nuisance by the closing of the building in which it is maintained "as against the use or occupation of the same for saloon purposes," has been held to confer power upon the municipality to so close a building used for the purposes of a brewery.[28] It has, however, been determined that, though it is provided by ordinance that all intoxicating liquors kept within the town limits for the purpose of being sold or given away to be drunk within said town are a nuisance which the police officers are directed to abate by removing such liquors beyond the town limits, such officers will not be justified in seizing and carrying away liquors until it has been judicially determined that there has been a violation of the ordinance.[29]

struct a public right or regulation the legislature may authorize its summary abatement by executive agencies without resort to judicial proceedings).

27. Coverdale v. Edwards, 155 Ind. 374, 58 N. E. 495.

28. The court here declared that "The words 'saloon purposes' as here used, mean more than simply a place for the retail of intoxicating drinks. The evident intent of the legislature is that the court shall order the abatement of every place established to be a nuisance, either by being maintained for the unlawful manufacturing, selling or keeping of intoxicating liquors. It would be a manifest disregard of the legislative intent to say that these nuisances should not be abated by being closed, as provided in the statute, simply because they are not generally designated as 'saloons.' The term saloon, though often differently applied, as used in this statute, has reference to places that are nuisances by reason of the unlawful manufacturing, selling, or keeping for sale of intoxicating liquors." Craig v. Werthmueller, 78 Iowa, 598, 43 N. W. 606, per Given, C. J., construing Iowa Code, § 389.

29. It was said by the court in this case: "Even if the power were conceded to the town, of seizing, carrying away and destroying this man's beer and spirits, if kept for sale to be drunk within the town, as to which we express no opinion, the question not having been argued, yet it certainly cannot be denied, that such a power could be exercised only by some judicial instrumentality. Even under

§ 373. **Nuisance on public lands—Power of Congress to order abatement.**—Where the "enclosure of any public lands" is prohibited by act of Congress, the enclosure of a part of such lands by a fence in violation of the act will constitute a nuisance the abatement of which may be ordered by Congress whether the lands are located within a territory or State. In this connection it has been declared by the United States Supreme Court: "While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a territory, we do not think the admission of a territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of State legislation." [30]

§ 374. **Right of individual to summarily abate private nuisance.**—The right of an individual to summarily abate is also held to exist in the case of a private nuisance by which he sustains an injury,[31] and entry for the purpose of abatement is declared

this ordinance, the beer and spirits were not a nuisance liable to summary destruction, unless they were kept for sale or gift, to be drunk within the town; and whether they were kept for that purpose was a question which the owner had the right to submit to a court of justice before his property could be taken away. The board of trustees of Eureka had no more power to authorize their police officers to perform acts of this character, than they had to authorize them at discretion to assess a fine of fifty dollars upon any man whom they might believe to keep spirits for sale, and seize his property or person for its payment, without inquiry before a court, or an opportunity of being heard in his own defense. Such proceedings are a violation of the elementary principles of our constitution and laws, and it is unnecessary to enlarge upon this topic. A man's property cannot be seized except for a violation of law, and whether he has been guilty of such violation cannot be left to police officers or constables to determine." Darst v. People, 51 Ill. 286, 2 Am. Rep. 301, per Mr. Justice Lawrence. See State v. Stark, 63 Kan. 529, 66 Pac. 243, 54 L. R. A. 910.

30. Camfield v. United States, 167 U. S. 518, 526, 42 L. Ed. 260, 263, 17 Sup. Ct. R. 864, per Mr. Justice Brown.

31. Harvey v. Dewoody, 18 Ark.

to be justifiable.[32] It is essential, however, to entitle one to abate a private nuisance that he suffer some injury therefrom, as a nuisance of this character can only be summarily abated by one who is injured by it.[33] And the exercise of this right is also subject to the limitation that the danger must be imminent in order to authorize a private individual to take the execution of the law into his own hands, for where there is time and opportunity for the interposition of an adequate legal remedy, which may be effectual, the law will not justify a summary resort to force.[34] The nuisance must also be one which injures the individual at the time of its abatement.[35] The exercise of the right to abate a nuisance of this character may, however, be barred by limitations.[36] But the abatement of a nuisance by a person will not preclude him, in an action on the case, from a recovery of damages sustained prior to such abatement.[37] And, on the other hand, the fact that the nuisance complained of might have been abated by the plaintiff will not necessarily mitigate the damages which he may recover.[38]

§ 375. **Same subject—When right may be exercised.**—An individual may remove an embankment which creates a nuisance by cutting off his right to have the water flow over his land in natural channels and drains.[39] And where the nuisance consists of refluent water thrown back in the channel of a stream so as to raise the level of the water where it passes over a person's land, thereby diminishing his water supply, and such refluence of water

252; Liles v. Cawthorne, 78 Miss. 559, 29 So. 834; Lancaster Turnpike Co. v. Rogers, 2 Pa. St. 114, 44 Am. Dec. 179.

32. Lancaster Turnpike Co. v. Rogers, 2 Pa. St. 114, 44 Am. Dec. 179.

33. Gates v. Blincoe, 2 Dana (Ky.), 158, 26 Am. Dec. 440; Turner v. Lacy, 37 Or. 158, 61 Pac. 342.

34. Graves v. Shattuck, 35 N. H. 257, 69 Am. Dec. 536.

35. Moffett v. Brewer, 1 G. Greene (Iowa), 348.

36. West v. Louisville, Cincinnati & L. R. Co., Bush (Ky.), 404.

37. Gleason v. Gary, 4 Conn. 418.

38. Jarvis v. St. Louis, I. M. & S. R. Co., 26 Mo. App. 253 (so holding where the carcass of a dead animal was left on the premises adjoining those of the plaintiff).

39. Overton v. Sawyer, 1 Jones L. (S. C.) 308, 62 Am. Dec. 170.

is caused by a dam or obstruction made by the inferior proprietor it has been decided that the person sustaining such injury may of his own authority enter upon the land of such inferior proprietor and remove so much of the dam or other obstruction as causes the refluent water.[40] So, again, in another case, it is decided that a riparian proprietor, upon whose lands the water is thrown back, or its level raised without overflowing the banks of the stream, by a dam erected below him, has a right to abate the nuisance. The proper mode of abating the nuisance in such case is declared to be by lowering the level of the dam, if there be a prescriptive right, to the height authorized by such prescription, or, in the absence of any prescription, to such a height as will stop the refluence of the water at his boundary line. He has, however, no right to divert the water from the stream to the injury of the proprietor below him, by cutting a ditch on his own land.[41] So where a dam is erected for the purpose of turning water into a mill race and conducting it to a mill and such dam is injurious to the use of mining property above the dam by flooding the ground and preventing the outlet to the tailings from such property, such dam may, after notice, be removed in a peaceable manner and abated as a nuisance by the upper proprietors if they were first in the appropriation of the water for mining purposes. And they will not be liable in damages for such removal where the statute of the State prescribes a remedy but does not take away the common law remedy in the abatement of nuisances not embraced by such statute.[42] And in a plea of justification or excuse for an entry to abate a nuisance caused by the flowing of certain land by the plaintiff's dam it has been held sufficient to allege possession of an undivided moiety of such land without stating more particularly what title the defendant had, it being declared that the possession thus alleged must be taken to be a lawful possession and that it would seem that the defendant would have the right to abate although his possession was only for a term.[43] In the exer-

40. Liles v. Cawthorne, 78 Miss. 559, 564, 29 So. 834.

41. Wright & Rice v. Moore, 38 Ala. 594, 82 Am. Dec. 731.

42. Stiles & Davis v. Laird, 5 Cal. 121, 63 Am. Dec. 110.

43. Great Falls Co. v. Worster, 15 N. H. 412.

cise of this right it has also been decided that an individual whose property is imperilled by a moving building has the right to use whatever force is necessary to protect that property from injury.[44] And where a boat house built in a river at the foot of a public street, in such adjacency to another's premises as to destroy a passage desired by him for ingress and egress constituted a nuisance it was decided that the latter after notice to the former and his refusal to remove it was justified in abating it so far as was necessary to secure to himself the right of way, the same being accomplished without breach of the peace.[45] And the branches of trees may constitute a nuisance where they overhang the premises of another, but only so far as they extend over such premises, and it has been decided that the nuisance may be abated to that extent. No right, however, exists to cut down the trees or to remove any more of the branches than so overhangs.[46]

§ 376. Limitations on right to abate.—One who destroys or injures private property or interfers with private rights in the abatement of an alleged nuisance, unless his act is authorized by the judgment or order of a court having jurisdiction, acts at his peril, and when his act is challenged in a regular judicial tribunal he will be liable therefor unless he can justify his conduct by

44. Graves v. Shattuck, 35 N. H. 257, 69 Am. Dec. 536.

45. People v. Severance, 125 Mich. 556, 84 N. W. 1089, 7 Det. Leg. N. 650 in which the court said: "There seems to be no dispute but that the building, standing as it did, destroyed the pasage which the respondent had the right to use for ingress and egress to his premises from the highway in front of his premises. The mere fact that the boat-house stood in the waters of Grand river, instead of upon the land on Lenawee street gave Mr. Brackett no right to have it continued there. The respondent's premises extended to the thread of the stream in Grand river, and the boat-house obstructed his entrance thereon. The court should have directed the jury that the building, standing at the foot of this public thoroughfare, though in the waters of Grand river, being so near to respondent's premises that it shut off his ingress and egress, was a nuisance in fact. When Mr. Brackett refused to move the boat-house after notice, the respondent had the right to abate the nuisance, and the jury should have been so instructed," per Long, J.

46. Grandona v. Lovdal, 70 Cal. 161.

showing that the thing abated was in fact a nuisance. This rule is said to have the sanction of public policy and to be founded upon fundamental constitutional principles.[47] Where a nuisance in fact exists an individual is authorized to take such steps as are reasonably necessary to free himself from the danger,[48] and in the removal or abatement of a nuisance, he is only liable to the owner of property affected for a wanton or unnecessary injury.[49] On the other hand he is obligated to use reasonable care to avoid any unnecessary injury to the property or person of another.[50] He must proceed in a reasonable manner in the abatement of a nuisance,[51] and no more injury must be done to property than is necessary to effect the desired object.[52] If any unnecessary injury is inflicted he will be liable in damages to the owner of the property therefor.[53] As is said in a case in Iowa: "That a person at common law has a right to abate a nuisance can not be denied. It is one of those rights which secure to him the uninterrupted enjoyment of his person and property. When properly exercised, it may be as essential to his happiness as the right of self defense. But like other summary rights of this nature, it is confined within

47. People, Copcutt, v. Yonkers Board of Health, 140 N. Y. 1, 35 N. E. 320, 55 N. Y. St. R. 416, 23 L. R. A. 481, 44 Am. & Eng. Corp. Cas. 318, affirming 71 Hun (N. Y.), 84, 54 N. Y. St. R. 317, 24 N. Y. Supp. 629. See, also, Tissot v. Great Southern Telephone & Teleg. Co., 39 La. Ann. 996, 3 So. 261, 4 Am. St. R. 248.

48. McKeesport Sawmill Co. v. Pennsylvania Co., 122 Fed. 184 (so holding in the case of a coal barge which slipped from its moorings and lodged against a railroad bridge, endangering the safety of the structure).

49. City of Indianapolis v. Miller, 27 Ind. 394 (holding that the kind of propertly constituting the nuisance and the attending circumstances must be considered in determining the question).

50. Calef v. Thomas, 81 Ill. 478.

51. Great Falls Co. v. Worster, 15 N. H. 412.

52. State v. Moffett, 1 G. Greene (Iowa), 247; Gates v. Blincoe, 2 Dana (Ky.), 158, 26 Am. Dec. 440; Shepard v. People, 40 Mich. 487; Harrower v. Ritson, 37 Barb. (N. Y.) 301; Turner v. Lacy, 37 Or. 158, 61 Pac. 342. In exercising the common law right of abating a nuisance, the party should go no further than is absolutely necessary and should commit the least practicable injury in accomplishing the object. Moffett v. Brewer, 1 G. Greene (Iowa), 348.

53. Gates v. Blincoe, 2 Dana (Ky.), 158, 26 Am. Dec. 440.

certain limits. No more injury to the property of another must be inflicted than is absolutely necessary to accomplish the object. A salutary check is thrown around an improper exercise of this right, as the individual is always under the peril of being deemed a trespasser, unless the existence of the nuisance is established. Thus, while a person can be the judge, in the first instance, as to the existence of the nuisance, if it should turn out otherwise he is responsible, and can be made to answer to the party injured, and may subject himself to a criminal prosecution." [54] In exercising the right, however, to abate a nuisance, a person is not obligated to do it in the manner most convenient for the other party.[55]

§ 377. **Same subject continued—Buildings and structures.**—Where a nuisance consists in the use of a building and not in the building itself, the destruction of the building will not be justified, the remedy in that case being to stop such use,[56] as the destruction of property which can be used in a lawful and proper manner is not authorized by the common law power to abate nuisances.[57] So in a case in Illinois this rule was followed in an action of trespass to recover damages for breaking and entering a storehouse and for tearing down and destroying the same and for taking personal property from the house and destroying it. The defendants attempted to justify their act by setting up that the house was a disorderly one by reason of the fact that liquors were kept there for sale without a license, and that persons of bad repute assembled there, thus causing great annoyance to them and creating a public nuisance. The court said in its opinion: "We hazard nothing in saying that no adjudged case can be found that has held that the facts set up in this plea, or the evidence introduced under it, constitutes a defense for the destruction of such

54. State v. Moffett, 1 Greene (Iowa), 247, 249, per Kenney, J.

55. Great Falls Co. v. Worster, 15 N. H. 412.

56. Nazeworthy v. Sullivan, 55 Ill. App. 48; Barclay v. Commonwealth, 25 Pa. St. 503, 64 Am. Dec. 715 (so holding where the nuisance consisted in the use of a barn and not in the barn itself).

57. Chicago v. Union Stockyards & T. Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281.

property. A few individuals, or even a large portion of the community, have no power to take the law into their own hands, and, in a summary way, enforce the criminal laws of the State. In doing so the law is violated, and peace and good order of society is endangered, and riot and bloodshed is invited. In fact, those who are so anxious to thus preserve the morals and good order of society, do not reflect that, in doing so, they are themselves violating the criminal code, and rendering themselves liable to indictment. When men who profess to be moral, and have standing in society, resort to such violent and unlawful acts, they must expect their example will not be lost on the ignorant, vicious and corrupt portion of society. Their natures need restraint, and not prompting to acts of violence; and when we see respectable persons thus violate the law and render themselves liable to be punished criminally, they need not be surprised if crime of a more serious character shall become common in that community. It may be that public sentiment can be so perverted as to render it impossible to punish persons engaged in acts like the present case, but when the law shall be so far broken down that such wrongs may be perpetrated with impunity, such persons have no right to complain if they shall find themselves without redress, when their own rights are invaded, civilly or criminally."[58] So it has been decided that where a building is occupied as a house of ill-fame, and the nuisance is caused by such occupation, individuals have no right to abate the nuisance by demolishing the building.[59] And it has also been decided that where the removal of a structure is not necessary to abate a nuisance its restoration may be enforced.[60]

58. Earp v. Lee, 71 Ill. 193, 195, per Mr. Justice Walker.

59. Welch v. Stowell, 2 Doug. (Mich.) 332, wherein it is also decided that a statute empowering the common council of a city "to make all such by-laws and ordinances as may be deemed expedient for the purpose of preventing and suppressing houses of ill fame within the limits of the city" does not authorize the common council by ordinance and resolution to demolish a house occupied as a house of ill fame and adjudged by such council to be a common nuisance. As to right of municipality to destroy buildings, see §§ 349-351, herein. As to power of municipality to summarily abate nuisances, see §§ 345-348 ,herein.

60. Morrison v. Marquardt, 24 Iowa, 35, 92 Am. Dec. 444.

§ 378. Same subject continued—Other instances.—If a person has a right to use a drain for some purposes and to some extent, an abuse of that right does not deprive him of it. In such a case another person who feels himself aggrieved should not totally destroy the drain and thus strike a summary blow against both individual and public privilege.[61] And if a milldam is erected so high as to flow the water back upon a dam above it, under circumstances which might justify the injured party in abating it by his own acts, he must confine his operations to the dam itself and to such portions of it as caused the injury.[62] So where a nuisance is caused by the pollution of a pond of water, an individual who is injured thereby cannot destroy the pond by filling it, but can only abate the cause which renders the water impure.[63] So where the laying of railroad tracks through a city and transportation of freight over such tracks is authorized by law a municipality, though empowered to abate nuisances, has no authority to remove such tracks, thereby destroying the value of the road, for the purpose of abating a nuisance created by the transportation through the city of live stock and substances which are injurious to health.[64] And where a franchise was granted to a company for the operation of a street railway by cable it was decided that a railway adapted only to use by horses was not a nuisance which could be abated by the municipality, but that the proper remedy was for the city to take measures to compel the operation of the road by cable.[65] So, again, it has been decided

61. Masonic Association v. Harris, 79 Me. 250, 9 Atl. 937.

62. Moffett v. Brewer, 1 G. Greene (Iowa), 348.

63. Finley v. Herschey, 41 Iowa, 389 (so holding where the nuisance consisted of the deposit in a pond of offal from a slaughter house).

64. Chicago v. Union Stockyards & T. Co., 164 Ill. 224, 45 N. E. 430, 35 L. R. A. 281.

65. Spokane Street R. Co. v. Spokane Falls, 6 Wash. 521, 33 Pac. 1072. The court here said: "The mere fact that the grantee of a franchise to lay and maintain a cable railway should lay down a street railway not adapted to the use of a cable, but only adapted to use by means of horses, would not constitute the horse railway a nuisance which could be abated by the municipal corporation at its pleasure. In such a case the only proper course would be for the city to take such proceedings as would result in compelling the oper-

that the destruction of a private railroad over a private way is not justified by the fact that it is negligently operated; that the streets are obstructed by cars which are allowed to stand, and that rubbish and waste is allowed to accumulate along the way of such railroad.[66] And in the case of a nuisance affecting the highway, such as electric light poles, it is held that an individual can interfere with them only so far as it is necessary to the exercise of his right in passing along the highway.[67]

§ 379. **Right to summarily abate as affected by statute.**—A statute authorizing commissioners of highways to order the removal of fences by which highways have been encroached upon does not abrogate the common law remedy of the abatement of a nuisance by the mere act of individuals. The remedy so given by statute is held to be merely cumulative.[68] And the right of abating a public nuisance is not affected by a statute imposing a penalty for the offense, unless negative words are added, evincing an intent to exclude common law remedies.[69] And a statute conferring equitable jurisdiction upon a court in cases of nuisance does not extinguish the right of a party who has been injured by a nuisance to abate the same.[70]

§ 380. **Right not affected by constitutional provisions for protection of property.**—The exercise of right existing at common law to summarily abate a nuisance is not in conflict with a constitutional provision protecting rights in property.[71] So it is said

ation of the road by cable instead of by horses," per Stiles, J.

66. Corey v. Borough of Edgewood, 18 Pa. Super. Ct. 216.

67. Electric Construction Co. v. Hefferman, 34 N. Y. St. R. 436, 12 N. Y. Supp. 336, 58 Hun (N. Y.), 605 mem.

68. Neal v. Gilmore (Mich., 1905), 104 N. W. 609; Wetmore v. Tracy, 14 Wend. (N. Y.) 250, 28 Am. Dec. 525.

69. Renwick v. Harris. 7 Hill (N. Y.), 575; see State v. Moffett, 1 G. Greene (Iowa), 247.

70. Great Falls Co. v. Worster, 15 N. H. 412.

71. Nazeworthy v. Sullivan, 55 Ill. App. 48; Cartwright v. City of Cohoes, 39 App. Div. (N. Y.) 69, 56 N. Y. Supp. 731, affirmed in 165 N. Y. 631, 59 N. E. 1120.

It is not a taking of property without due process of law (Coe v.

in a case in New Jersey that: "Such destruction for the public safety or health, 'is not a taking of private property for public use, without compensation or due process of law, in the sense of the constitution. It is simply the prevention of its noxious and unlawful use, and depends upon the principles that every man must so use his property as not to injure his neighbor, and that the safety of the public is the paramount law. These principles are legal maxims or axioms essential to the existence of regulated society. Written constitutions presuppose them, are subordinate to them, and cannot set them aside. They underlie and justify what is termed the police power of the State. By virtue of that power, numerous and onerous restrictions and burdens are imposed upon persons and property which, for other purposes or on other grounds, would be prohibited by the constitutional limitations sought to be applied in this suit." [72] So it is declared in a case in New York that where a public nuisance consists in the location or use of tangible personal property so as to interfere with or obstruct a public right or regulation the legislature may authorize its summary abatement by executive agencies without resort to judicial proceedings, and any injury to or destruction of the property necessarily incident to the exercise of the summary jurisdiction interferes with no legal right of the owner, and is not in violation of a constitutional provision against depriving the owner of property without due process of law.[73]

Schultz, 2 Abb. Prac. U. S. [N. Y.] 193) or without the judgment of one's peers (Weil v. Schultz, 33 How. Prac. [N. Y.] 7).

72. Manhattan Mfg. & Fert. Co. v. Van Keuren, 23 N. J. Eq. 251, 255, per the Vice-Chancellor, citing Cooley on Const. Lim. 572; Potter's Dwarris on Statutes, 444.

73. Lawton v. Steele, 119 N. Y. 227, 23 N. E. 878, 29 N. Y. St. R. 581, 7 L. R. A. 134, affirmed in 152 U. S. 133, 38 L. Ed. 385 (so holding in the case of fish nets set in waters in violation of law). See also State v. Snover, 42 N. J. L. 341; Rea v. Hampton, 101 N. C. 51.

It is a proper exercise of the police power, where property has become a public nuisance, or has an unlawful existence, or is noxious to the public health, public morals, or public safety, to destroy such property without compensation to the owner. Houston v. State, 98 Wis. 481, 74 N. W. 111, 42 L. R. A. 111.

§ 381. **Costs of abating nuisance.**—In the exercise of the police power possessed by the State it may by statute provide that the costs of abating a nuisance shall be assessed against the property of the one by whom it is maintained. So where it was provided by statute that a city might drain or grade or fill up lots to prevent stagnant water or banks of earth or other nuisance and that the costs thereof should be assessed against the lots so filled it has been decided that such statute is not a violation of a constitutional provision relating to special taxation for local improvements. It was, however, decided in this case that where notice to the owner to abate was required and none was given that an assessment against the property was void and would be cancelled as a cloud on the title.[74] The court said in this connection: "Under the section of the charter above quoted it is quite clear that the power of the city to fill or grade the lots in question at the owner's expense depended upon a previous demand having been made upon him to do the work and a refusal on his part to do it. Demand and refusal were indispensible and prerequisite to the authority of the city to improve the property and charge it with the expense of the improvement. The legislature having prescribed the terms on which the city was authorized to make assessments of this character, the power to make them could be lawfully exercised, only, where there had been a substantial compliance with the statute. This proposition is well established by authority."[75]

74. Horbach v. City of Omaha, 54 Neb. 83, 74 N. W. 434.

75. Per Sullivan, J. See in this connection, Los Angeles County v. Spencer, 126 Cal. 670, 59 Pac. 202.

CHAPTER XVIII.

Remedies Continued—Subject Matter of Remedy.

Section 382. Dangerous nuisances generally.
383. Same subject—Negligence.
384. Dangerous nuisances continued—Gunpowder, dynamite and other explosives.
385. Same subject—Rules continued—Instances.
386. Same subject continued.
387. Dangerous nuisances continued—Petroleum, gasoline, naphtha, crude oils, etc.
388. Same subject continued.
389. Dangerous nuisances continued—Spring guns.
390. Baseball—Ball park.
391. Bawdy house or house of ill-repute.
392. Bees.
393. Cemeteries, burial grounds.
394. Cooking and cooking ranges.
395. Gambling house.
396. Deposits on land.—Garbage, ashes, offensive, etc., matter.
397. Hospitals, pest-houses, infectious and contagious diseases.
398. Steam engines and boilers.
399. Liquor nuisance.—Civil and criminal actions or remedies.
400. Same subject.
401. Same subject.
402. Common scold.
403. Fences and structures.—Generally.
404. Same subject.—Continued.
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407. Dams.—Civil and criminal remedies.
408. Private way, right of way.
409. Other special instances of what is subject matter of remedy.
410. Same subject.—Continued.
411. Other special instances of what is not subject matter of remedy.
412. Same subject.—Continued.
413. Other special instances of when and for what indictment lies.
414. Same subject.—Continued.

§ 382. **Dangerous nuisances generally.**—A well known English case is frequently cited to the proposition that one who for his own purpose brings upon his land and collects and keeps there anything liable to do mischief if it escapes, must keep it at his peril. If the owner of land uses it for any purpose which from its character may be called non-natural user, such as, for example, the introduction onto the land of something which in the natural condition of the land is not upon it, he does so at his peril, and is liable if sensible damage results to his neighbor's land, or if the latter's legitimate enjoyment of his land is thereby materially curtailed.[1] Substantially the same doctrine is asserted in a Kentucky

1. Fletcher v. Rylands, L. R. 1 Exch. 265, affd. Rylands v. Fletcher, L. R. 3 H. L. Cas. 330, 340; qualified, Cumberland Teleph. & Teleg. Co. v. United Elect. R. Co., 42 Fed. 280, 3 Am. Elect. Cas. 417; cited Walsh v. Hayes, 72 Conn. 397, 44 Atl. 725, 7 Am. Neg. Rep. 24 (but declared not applicable if it be law); considered, Cahill v. Eastman, 18 Minn. 324, Gilf. 292, 306-308, 310, 10 Am. Rep. 184; explained and modified Murphy v. Gillum, 73 Mo. App. 490; doubted, Garland v. Towne, 55 N. H. 55, 57, 60, 20 Am. Rep. 164 (where Ladd, J., says: "I am not aware that any court on this side of the Atlantic has gone as far as this"); criticised Brown v. Collins, 53 N. H. 442, 16 Am. Rep. 372; distinguished and criticised, Beach v. Stirling Iron & Zinc Co., 54 N. J. Eq. 75; criticised, Marshall v. Wellwood, 38 N. J. L. 339, 343, 345 (as a broad statement which cannot be said to be the rule in this country irrespective of the questions of negligence or want of care or skill); distinguished Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623 (where the court says: "It is sufficient, however, to say that the law as laid down in those cases [including Smith v. Fletcher, 20 W. R. 987] is in direct conflict with the law as settled in this country." This New York decision was declared to be controlling in Cosulich v. The Standard Oil Co. of N. Y., 122 N. Y. 118, 124, 33 N. Y. St. R. 287, 25 N. E. 259, 19 Am. St. Rep. 475); distinguished Simmons v. Paterson, 58 N. J. Eq. 1, 42 Atl. 752; cited, George v. Cypress Hills Cemetery, 32 App. Div. 281, 14 W. R. 799, 52 N. Y. Supp. 1097, 4 Am. Neg. Rep. 794 (in dissenting opinion, Woodward, J.); principle explained, Cleveland Terminal & Valley Rd. Co. v. Marsh, 63 Ohio St. 236, 58 N. E. 821, 9 Am. Neg. Rep. 177; approved, Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co., 60 Ohio St. 560, 54 N. E. 528 (case given in full in note 36, § 385, herein); criticised, Pennsylvania Coal Co. v. Sanderson, 113 Pa. 126, 150, 152, 57 Am. Rep. 445, 6 Atl. 453; considered substantially overruled, Frost v. Berkeley Phosphate Co., 42 S. C. 412, 26 L. R. A. 603; disapproved, Klepsch v. Donald, 4 Wash. 439; distinguished McBryan v. Canadian Pac. R. Co., 29

case and is applied to substances above or below the ground.[2] So it is held that one who creates on his land an electric current for his own purposes and discharges it into the earth beyond his control is as liable for damages caused by it as he would if he had discharged a stream of water, but where the act is done in pursuance of a provisional order duly authorized, it is protected to the same effect as other nuisances under statutory authority.[3] And to substantially the same effect a person is held liable for the injury sustained by pollution of a well by percolations through subterranean streams of unwholesome matter from deposits on his premises.[4] So where a neighbor's ice-house is likewise befouled there is an actionable nuisance,[5] and such percolations into a cellar will be abated.[6] So there exists a liability for percolations from a reservoir where they injure adjacent lands.[7] But the owner is held not liable to trespassers for a dangerous nuisance maintained upon enclosed premises.[8] So machinery which is not peculiarly dangerous in itself if left unguarded and which is in use in the prosecution of a lawful work even though it may be dangerous if interfered with is not a nuisance and the employer is not liable for the negligence of a contractor in leaving the same unguarded even though children who are rightfully upon the premises are injured thereby.[9]

§ 383. **Same subject—Negligence.**[10]—It has been held that it is a prerequisite to liability for an explosion that there should

Can. Sup. Ct. 373; see Joyce on Electric Law, § 509; §§ 27, , herein.

2. Kinnaird v. Standard Oil Co., 89 Ky. 468, 11 Ky. L. Rep. 692, 12 S. W. 937, 7 L. R. A. 451, 30 Cent. L. J. 267, 41 Alb. L. J. 227.

3. National Teleph. Co. v. Baker (1893), 2 Ch. 186, 68 L. T. R. N. S. 283, 47 Alb. L. J. 411, 4 Am. Elec. Cas. 327. See Joyce on Electric Law, § 509.

4. Beatrice Gas Co. v. Thomas, 41 Neb. 662, 43 Am. St. Rep. 711, 2 Ohio Leg. N. 70, 30 Cent. L. J. 363, 59 N. W. 925.

5. Anheuser-Busch Brewing Assoc. v. Peterson, 41 Neb. 897, 60 N. W. 373.

6. Perrine v. Taylor, 43 N. J. Eq. 128, 12 Atl. 769, 10 Cent. Rep. 424; Fleischner v. Citizen's Real Estate & I. Co., 25 Oreg. 119, 35 Pac. 174.

7. Wilson v. City of New Bedford, 108 Mass. 261, 11 Am. Rep. 352.

8. Hutson v. King, 95 Ga. 271, 22 S. E. 615.

9. Wood v. The Independent School District of Mitchell, 44 Iowa, 27, 31.

10. See § 44, herein.

have been negligence,[11] and that the keeping of gunpowder in a certain place near a dwelling house to constitute a nuisance must be negligently and improvidently done.[12] But it has also been decided that the question whether a nuisance exists does not depend upon the degree of care used, since a nuisance may exist even though explosives should be carefully kept or stored. Thus in the case of an action for injuries from the explosion of fireworks the court instructed the jury to find for the defendant "unless they found that the defendant carelessly and negligently kept the gunpowder on his premises" and he refused to charge, at plaintiff's request, "that the power magazine was dangerous in itself to plaintiff and was a private nuisance, and defendant was liable to the plaintiff, whether it was carelessly kept or not," and a verdict for defendant was reversed on the ground that the charge given was erroneous.[13] This principle is also applied in another case; thus the factor of carlessness or negligence in keeping explosives is immaterial where a nuisance exists even though not one *per se*.[14] The last decisions would seem to be in accord with the general rule as to negligence and care or want thereof.[15]

11. Cook v. Anderson, 85 Ala. 99, 4 So. 713.

12. People v. Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296. See Crowley v. Rochester Fireworks Co., 95 App. Div. 13, 88 N. Y. Supp. 483; Bradley v. People, 56 Barb. (N. Y.) 72; Nelson v. McLellan, 31 Wash. 208, 71 Pac. 747.

13. Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654.

14. Lounsbury v. Foss, 80 Hun (N. Y.), 296, 61 N. Y. St. R. 829, 30 N. Y. Supp. 89, affd. 145 N. Y. 600, 65 N. Y. St. R. 866. See, also, Hazard Powder Co. v. Volger, 58 Fed. 152, 158, 7 C. C. A. 130, 136; Laflin & Rand Powder Co. v. Tearney, 131 Ill. 322, 21 N. E. 516, 23 N. E. 389, 7 L. R. A. 262, 19 Am. St. Rep. 34, affg. 30 Ill. App. 321; Wilson v. City of New Bedford, 108 Mass. 261, 11 Am. Rep. 352; Hauck v. Tide Water Pipe Line Co., 175 Pa. 366, 26 Atl. 644, 20 L. R. A. 642, 32 W. N. C. 45; Wilson v. Phoenix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035. Examine Kleebauer v. Western Fuse & Explosives Co., 138 Cal. 497, 60 L. R. A. 377, 94 Am. St. Rep. 62, 71 Pac. 617, 13 Am. Neg. Rep. 475, rev'g 69 Pac. 246, where the question of carrying on the business with care was a factor; Pritchard v. Edison Illuminating Co., 92 App. Div. 178, 87 N. Y. Supp. 225, affd. 179 N. Y. 364, 72 N. E. 243; Cumminge v. Stevenson, 76 Tex. 642, 13 S. W. 556, where one of the factors was the unprotected manner of stowing.

15. See § 44, herein.

§ 384. **Dangerous nuisances continued—Gunpowder, dynamite and other explosives.**—The manufacturing, keeping or storing of gunpowder, dynamite or other explosive and dangerous substances does not necessarily constitute a nuisance *per se*. That depends upon locality, the manner of its keeping or use, the quantity and all the surrounding circumstances.[16] So gunpowder may be stored and used to manufacture fuse, and it is not a nuisance *per se*.[17] But location may make the keeping of gunpowder a nuisance where injury from explosion is liable to occur to those residing in the neighborhood,[18] and the rule applies even though only plaintiff's person or household is endangered.[19] So it was declared in an early English case that: "Though gunpowder be a necessary thing, and for the defense of the kingdom, yet if it be kept in such a place, as it is dangerous to inhabitants or passengers, it will be a nuisance."[20] So not only is the location material,

16. Kinney v. Koopman, 116 Ala. 310, 22 So. 593, 37 L. R. A. 497; Kleebauer v. Western Fuse & Explosives Co., 138 Cal. 497, 60 L. R. A. 377, 71 Pac. 617, 13 Am. Neg. Rep. 475, 479-481, 94 Am. St. Rep. 62, revg. 69 Pac. 246; Heeg v. Licht, 80 N. Y. 579, 581, 36 Am. Rep. 654, per Miller, J., case reverses 16 Hun, 257; Lounsbury v. Foss, 80 Hun, 296, 61 N. Y. St. R. 829, 30 N. Y. Supp. 89; People v. Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296; Tuchackinsky v. Lehigh & W. Coal Co., 199 Pa. 515, 49 Atl. 308; Appeal of Dilworth, 91 Pa. 247; Appeal of Wier, 74 Pa. 230; Emory v. Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730. See Flynn v. Butler, (Mass., 1905), 75 N. E. 730; State v. Paggett, 8 Wash. 579, 36 Pac. 487.

17. Kleebauer v. Western Fuse & Explosives Co., 138 Cal. 497, 60 L. R. A. 377, 71 Pac. 617, 13 Am. Neg. Rep. 475, 479-481, 94 Am. St. Rep. 62, revg. 69 Pac. 246.

18. Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654. See Cebulski v. Hutton, 47 App. Div. 107, 62 N. Y. Supp. 166; Reilly v. Erie R. R. Co., 76 N. Y. Supp. 620, 72 App. Div. 476; Myers v. Malcolm, 6 Hill (N. Y.), 292, 41 Am. Dec. 744; Appeal of Wier, 74 Pa. 230.

A double gunpowder magazine is a nuisance when it exists under conditions that make it a constant menace to the safety of the immediate community, especially when the danger of explosion is increased by the proximity of other dangerous substances or explosives. Flynn v. Butler (Mass. 1905), 73 N. E. 730.

19. Laflin & Rand Powder Co. v. Tearney, 131 Ill. 322, 7 L. R. A. 262, 21 N. E. 516, 23 N. E. 389, 19 Am. St. Rep. 334, affg. 30 Ill. App. 321; Emory v. Hazard Powder Co., 22 S. C. 476, 53 Am. Rep. 730. See, also, Hazard Powder Co. v. Volger, 58 Fed. 152, 158, 7 C. C. A. 130, 136.

20. Anonymous, 12 Mod. * 342

but the quantity stored, as in case of dynamite is important,[21] and a nuisance exists where the quantity is excessive and the locality one where a large population reside.[22] And while it is held that gunpowder may even be kept in or near public places in large quantities,[23] still the keeping and storing of explosives near to railroads and public highways may constitute a public nuisance.[24] So the proximity to dwellings, the depreciation in the value and use thereof, the large quantity of powder kept, the unprotected manner of keeping, and the constant alarm and anxiety occasioned thereby make a powder magazine a nuisance.[25] But the fact that, contrary to anticipations, the value of property has depreciated will not warrant the issuance of an injunction in favor of a person who to benefit his land has induced a manufacturer of explosives to locate near such land and he has so located at a great expense.[26]

(case), 585, per Holt, C. J. (Syllabus is that "Gunpowder not to be kept in inhabited places," note to case is "See stat. 11, Geo. 3, c. 35, and 12 Geo. 3, c. 81").

As to gunpowder being a necessity to industries and exclusion of evidence thereof, see Cibulski v. Hutton, 47 App. Div. 107, 62 N. Y. Supp. 166.

21. Reilly v. Erie R. R. Co., 76 N. Y. Supp. 620, 72 App. Div. 476.

Whether the storing of dynamite is a nuisance per se by reason of inappropriate location may be a question of fact as to whether persons or property in proximity thereto would be exposed to danger unavoidable and inherent to the business when properly conducted. Facts tending to show that such business was being located in unnecessarily close proximity to the public highway frequently travelled by plaintiffs and their families, and to the residence and other buildings of plaintiffs, are proper allegations in a petition in an action to enjoin such storing of dynamite as a nuisance. Remsburg v. Iola Portland Cement Co. (Kan. 1906), 84 Pac. 548.

22. Ricker v. Shaler, 89 App. Div. 300, 85 N. Y. Supp. 825.

23. Kinney v. Koopman, 116 Ala. 310, 37 L. R. A. 497, 22 So. 593; People v. Sands, 1 Johns. (N. Y.) 78, 3 Am. Dec. 296.

24. Wilson v. Phoenix Powder Mfg. Co., 40 W. Va. 413, 21 S. E. 1035. See Huntington & K. Land D. Co. v. Phoenix Powder Mfg. Co., 40 W. Va. 711, 21 S. E. 1037; Cheatem v. Shearon, 1 Swan (31 Tenn.), 213, 55 Am. Dec. 734; Myers v. Malcolm, 6 Hill (N. Y.), 292, 41 Am. Dec. 744.

25. Cumminge v. Stevenson, 76 Tex. 642, 13 S. W. 556. See Hazard Powder Co. v. Volger, 58 Fed. 152, 158, 7 C. C. A. 130, 136.

26. Huntington & K. Land D. Co. v. Phoenix Powder Mfg. Co., 40 W. Va. 711, 21 S. E. 1037.

§ 385. **Same subject—Rules continued—Instances.**—Where the situation of a powder magazine and the character of the near-by and other intervening land is such as is calculated to do no injury even in case of an explosion an injunction will not be issued to restrain the erection thereof.[27] So the character of the original location as to residence, the fact that small quantities only are kept of the explosive, and that for years no complaint had been made, and also that lightning had caused the explosion are all factors showing that a private nuisance does not exist.[28] But where a dwelling was built before a near-by powder magazine its subsequent occupation does not constitute an assumption of the risk consequent upon the nearness of such a nuisance.[29] And no liability exists as to the manufacturer where a magazine is wilfully blown up by a stranger, and it is located in a suitable place.[30] Although, if an ordinance is violated in keeping a powder magazine, and such magazine is so situated with respect to a dwelling house that it is liable to inflict serious injury upon person and property, it constitutes a nuisance *per se*, but the liability is not solely by reason of the statutory prohibition unless such violation is in some degree the cause thereof.[31] But if in violation of a city charter different firms, of which defendant is one, store certain explosives or chemicals in a building and an explosion occurs consequent upon a fire causing death it must appear from the evidence whose property first exploded to ascertain the proximate cause of the death.[32] Again, the mere possibility of injury to near-by residents is insufficient to warrant restraining the erection

27. Appeal of Dilworth, 91 Pa. 247.

28. Tuchackinsky v. Lehigh & W. Coal Co., 199 Pa. 515, 49 Atl. 308. See second following note as to cause.

29. Prussak v. Hutton, 30 App. Div. 66, 51 N. Y. Supp. 761.

30. Kleebauer v. Western Fuel & Explosive Co., 138 Cal. 497, 60 L. R. A. 377, 71 Pac. 617, 13 Am. Neg. Rep. 475, 94 Am. St. Rep. 62, rev'g 69 Pac. 246. See second preceding note.

But liable where explosion from any cause. See, Hazard Powder Co. v. Volger, 58 Fed. 152, 158, 7 C. C. A. 130, 132.

31. Laflin & Rand Powder Co. v. Tearney, 131 Ill. 322, 21 N. E. 516, 7 L. R. A. 262, 23 N. E. 389, 19 Am. St. Rep. 34, aff'g 30 Ill. App. 321.

32. Schuck v. Main, 79 N. Y. St. R. 399, 39 Misc. 251.

of a powder house.[33] But a public nuisance may exist by reason of the discharge by private persons of fireworks in a narrow city street.[34] If, however, the digester in a pulp mill explodes and injures a lessee's employee the owner is not liable as for a nuisance where such digester is not dangerous when not in use.[35] Again, nitroglycerine is a substance usually recognized as highly explosive and dangerous, the storage of which at any place is a constant menace to the property in that vicinity. And one who stores it on his own premises is liable for injuries caused to surrounding property by its exploding, although he neither violates any provision of the law regulating its storage nor is chargeable with negligence contributing to the explosion. A right of action will exist in favor of all property within the circle of danger, and the fact that the property injured was not on premises adjacent to those on which the explosive substance was stored will not defeat a recovery.[36]

33. Dumesnil v. Dupont 18 B. Mon. (57 Ky.) 800, 68 Am. Dec. 750.

34. Speir v. Brooklyn, 139 N. Y. 6, 54 N. Y. St. R. 416, 44 Am. & Eng. Corp. Cas. 577, 21 L. R. A. 641, 48 Alb. L. J. 412, 36 Am. St. Rep. 664, 34 N. E. 727. Compare, Landan v. City of New York, 85 N. Y. Supp. 616, 90 App. Div. 50.

Authorized fireworks exhibition not a nuisance warranting recovery for injury if no negligence. See, Crowley v. Rochester Fireworks Co., 95 App. Div. 13, 88 N. Y. Supp. 483.

35. Whitmore v. Orono Pulp & P. Co., 91 Me. 297, 39 Atl. 1032, 40 L. R. A. 377, citing numerous cases.

36. Bradford Glycerine Co. v. St. Mary's Woolen Mfg. Co., 60 Ohio St. 560, 54 N. E. 528, 6 Amer. Neg. Rep. 674. The opinion of the court in this case, per Bradbury, C. J., is as follows: "The cause was submitted to the Court of Common Pleas on the following agreed statement of facts: 'It is hereby stipulated that this case will be submitted to the court upon the following statement of facts as the evidence in this case: Plaintiff is a corporation organized under the laws of Ohio, and owner of real estate whereon buildings are erected in the village of St. Mary's, Auglaize county, Ohio, and was such at all times stated in the petition filed in this action. The defendant is a partnership organized for the purpose of doing business in the state of Ohio, and owning property therein. On or about January 25, A. D. 1896, the defendant was the owner of a magazine and contents containing about fifty quarts of nitroglycerine used by the defendant in its business of manufacturing, storing, and vending nitroglycerine, which magazine was situated on a tract of land belonging to one W. G. Kishler, and situated

§ 386. **Same subject continued.**—In an important New Jersey case the facts and the questions of law decided are as follows: The defendant company were engaged in constructing their railroad, and the other defendants were contractors with the company for doing a portion of the work, under a contract which pro-

something over a mile west of the buildings so owned by the plaintiff in St. Mary's, Ohio, and situated about one-fourth of a mile distant from the corporation line of the village of St. Mary's, Auglaze county, Ohio. That on or about the said 25th day of January, A. D. 1896, while one of the defendant's servants was upon the premises upon which said magazine was located, engaged in transferring about seven hundred and fifty quarts of nitroglycerine from a wagon loaded with same to said magazine, the said nitroglycerine stored therein, and also the same upon the wagon aforesaid, from some cause unknown to said defendant, exploded with great force and concussion, causing vibrations in the atmosphere sufficient in power and violence to break, shatter, and destroy three plate glass and three common glass in the buildings owned by the plaintiffs aforesaid, of the value of two hundred and forty dollars and ten cents, by reason of which explosion and the breakage of said glass the plaintiffs were injured and damaged to the extent aforesaid. That nitroglycerine is a dangerous substance, and likely to explode. That demand of payment of said sum has been made by the plaintiff to the defendant, and payment thereof has been refused.' This agreed statement of facts does not show that the plaintiff in error violated any statute of the State, or was in any degree negligent in handling or storing the explosive substance involved. It was nitroglycerine, a well-known and highly-explosive agency, which the agreed statement of facts shows is a dangerous substance, and likely to explode. Is one who brings upon his own premises such agency liable for damages caused by its explosion, although such owner is not chargeable with either want of care or an unlawful act in connection with the casualty? This exact question has not heretofore been considered by this court, although a number of cases have been decided by the court that bear a general resemblance to it. Fuel Co. v. Andrews, 50 Ohio St. 695, 35 N. E. 1059; Water Co. v. Olinger, 54 Ohio St. 532, 44 N. E. 238; City of Tiffin v. McCormack, 34 Ohio St. 638. The tendency of these cases is towards holding the parties charged with the management of dangerous substances to a strict liability. In City of Tiffin v. McCormack, 34 Ohio St. 638, this court held: 'Where the owner of a stone quarry, by blasting with gunpowder, destroys the buildings of an adjoining landowner, it is no defense to show that ordinary care was exercised in the manner in which the quarry was worked.' And the same view of the liability of one who, by blasting rocks, cast fragments thereof against the house of another, was taken by the Court of Appeals of New York in the cases of

hibited them from subletting any part of the work, without the consent of the company's engineer, required them to employ competent servants, and provided that they should immediately discharge, whenever required by the engineer so to do, any servants

Hay v. Cohoes Co., 2 N. Y. 159, and Tremain v. Cohoes Co., Id. 163. The court in the first case decided that: 'The defendants, a corporation, dug a canal upon their own land for the purposes authorized by their charter. In so doing it was necessary to blast rocks with gunpowder and the fragments were thrown against and injured the plaintiff's dwelling upon lands adjoining. Held, that the defendants were liable for the injury, although no negligence or want of skill in executing the work was alleged or proved.' And in the second case that 'The defendants dug a canal upon their own land, and in executing the work blasted the rocks so as to cast the fagments against the plaintiff's house on contiguous lands. Held, in an action on the case brought to recover damages for the injury, that evidence to show the work done in the most careful manner was inadmissible, there being no claim to recover exemplary damages, and the jury having been instructed on the trial to render their verdict for actual damages only.' Counsel for the plaintiff in error contend that in respect of the matter under consideration the analogy between the act of blasting rock on one's premises and storing a dangerous explosive thereon is not close. In the one case the damage is caused by fragments of rock being hurled upon or against the property injured, while in the other case the damage is caused by violent atmospheric vibrations from the explosion. If, however, the explosion caused fragments of the building wherein the explosive material was stored, or other solid substance, to be thrown against the property injured, thereby producing damage, the analogy might be more easily perceived. True, it might be said that in the one case the party to be charged was actively engaged in the work that caused the injury, while in the other case he was simply using the premises to store the dangerous substance, not intending it should explode. These distinctions, however, do not seem to be material. The right of the owner of a stone quarry to blast rock therefrom where that is necessary to a profitable use of his property, or the right of one to make an excavation of any kind on his own property where blasting is a proper and a usual mode to accomplish the owner's purpose, would seem to be of as high and perfect a character as is the right of an owner to use his premises as a storehouse for explosive substances. Upon what principle should an owner of property hold it subject to the right of another to store on his own premises adjacent to it nitroglycerine, but not subject to the right of that other to blast rock? If one may store nitroglycerine on his own premises, and not be liable to adjacent property for damages caused by its exploding unless he has been negligent, while in the case of

considered by the engineer to be incompetent. The contractors, with the consent of the company, sublet the rock excavations to S., it being understood by all parties that nitroglycerine was to be used in blasting the rock. S. received permission of the engineer

the owner of the quarry the latter is liable for an injury to an adjacent property resulting from blasting, although free from negligence, then it is plain that the adjacent proprietor holds his property in the one case subject to the right of his neighbor to store a dangerous explosive, but not to the right of his neighbor to blast rock. In the first supposed case the liability grows, not out of the storing of the dangerous explosive, but out of the negligence of the person storing it, while in the last supposed case, the liability springs from the manner in which the property is used, i. e., the blasting and negligence need not be shown. If, in the latter instance, the party blasting is liable for injuries that resulted from his act, however careful he may have been, the reasons for absolving the former from liability, unless he has been negligent, are not apparent. The blasting doubtless is a menace to adjacent property, but so is the storing of a highly explosive substance.

In this case the premises on which the explosive substance was stored and the premises on which the building stood that was injured do not appear to have been adjacent. They were a mile apart, and, for anything that appears in the record, many parcels of real estate owned by third persons may have intervened. That, however, does not seem to be material either. One who, in blasting rock, should cast fragments across a strip of adjacent land owned by a third person against the windows of a more remote proprietor would hardly be heard to say in defense of his act that the property injured was not adjacent. Whatever duty he owed to his neighbor extended equally to all who might fall within the lines of danger. So it would seem in the case of explosives the right of all within the circle of danger should be equal, irrespective of whether the property injured was adjacent to the premises upon which the material was stored. The liability of one who, for his own purpose, brings up on his own premises substances dangerous to others if not kept under control, was exhaustively discussed by the judges of England in the case of Fletcher v. Rylands, 1 Exch. 265, and afterwards, on a review of the case, in the House of Lords, L. R. 3 H. L. 330 (1). In the exchequer chamber Justice Blackburn, in giving judgment, employed the following language: 'We think that the true rule of law is that the person who, for his own purposes, brings on his lands, and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default, or, perhaps, that the escape was the consequence of *vis major*, or the act

to erect on the company's land a magazine for storing nitroglycerine necessary for the work. Afterwards S., without knowledge of the defandants, stored in said magazine a quantity of nitroglycerine belonging to, and for the benefit of, another company.

of God; but as nothing of this sort exists here it is unnecessary to enquire what excuse would be sufficient. The general rule, as above stated, seems, on principle, just. The person whose grass or corn is eaten down by the escaping cattle of his neighbor, or whose mine is flooded by the water from his neighbor's reservoir, or whose cellar is invaded by the filth of his neighbor's privy, or whose habitation is made unhealthy by the fumes and noisome vapors of his neighbor's alkali works, is damnified without any fault of his own; and it seems but reasonable and just that the neighbor who has brought something on his own property which was not naturally there, harmless to others as long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbors', should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property. But for his act in bringing it there no mischief could have accrued, and it seems but just that he should, at his peril, keep it there so that no mischief may accrue, or answer for the natural and anticipated consequences. And upon authority this we think, is established to be the law whether the things so brought be beasts, or water, or filth, or stenches.' This language was approved in the House of Lords when the cause came up for consideration there, Lord Cranworth saying: 'My Lords, I concur with my noble and learned friend in thinking that the rule of law was correctly stated by Mr. Justice Blackburn in delivering the opinion of the exchequer chamber. If a person brings or accumulates on his land anything which, if it should escape, may cause damage to his neighbor, he does so at his peril. If it does escape, and cause damage, he is responsible, however careful he may have been, and whatever precautions he may have taken to prevent the damage.' The doctrine in this case (Fletcher v. Rylands, *supra*) has not been accepted by some of the courts of this country. Marshall v. Welwood, 38 N. J. Law 339; Sweet v. Cutts, 50 N. H. 439; Coal Co. v. Sanderson, 113 Pa. St. 126, 6 Atl. 453; Losee v. Buchanan, 51 N. Y. 476; but has been approved in Shipley v. Fifty Associates, 106 Mass. 194; Gorham v. Gross, 125 Mass. 232; Mears v. Dole, 135 Mass. 510; Cahill v. Eastman, 18 Minn. 324 (Gil. 292). In the case above cited from New York—Losee v. Buchanan, 51 N. Y. 476—and that from New Jersey—Marshall v. Wellwood, 38 N. J. Law, 339—a casualty occurred from an explosion of steam boilers.

To my mind, the analogy between the act of storing so highly explosive and dangerous an agency as nitroglycerine on one's premises and that of conducting a business thereon, which requires for its successful operation the use of steam, is not

While a portion of this last-named nitroglycerine was being removed, at the request of its owners, an explosion occurred, through the negligence of a servant of S., the sub-contractor, by which plaintiff's intestate was killed. It was held that defendants were

complete, although each is an explosive. Doubtless both are dangerous agencies, when control over them is lost. The use of steam has, however, so generally been employed in every productive industry that every owner of real property may reasonably be held to contemplate the contingency of its being employed upon adjacent premises, and to enjoy his property subject to that risk. In a great city like New York and Chicago, where numerous and various industries are conducted, there are doubtless many thousands of places where steam is employed. The entire population of such a city is interested, and most of them directly or indirectly benefited by these industries. Large numbers of them labor by day in factories where steam furnishes the motive power, and many of them sleep at night in buildings containing engines in active operation. The modern steam boiler and engine cannot be said to be such a menace to property and human life as to constitute a nuisance per se. They, cannot, as such, be driven from the centers of population. Not so, however. with gunpowder and nitroglycerine. These latter agencies, on account of their dangerous character, may be, and usually, if not universally are, driven into the suburbs of towns and cities, remote from human habitations and valuable structures. Under the circumstances that surround the productive arts and industries of to-day, a modification of the strict rule of liability in favor of those who employ steam in such arts or industries may not be inconsistent with its assertion against those who store gunpowder and nitroglycerine, or blast rocks, adjacent to the property of others. That public policy 'which seeks to secure the welfare of the many may demand such modification. Whether upon such grounds, or for any other reasons, such a modification of the rule should obtain in the case for the use of steam is not, of course, before the court, and the question is only considered in this brief way to show that there may be no irreconcilable conflict between the cases that have absolved the owners of boilers from liability for the consequences of an explosion occurring without their fault, and the conclusions reached by us in the case under consideration. Doubtless, gunpowder, nitroglycerine, and other dangerous explosives are useful agencies in many industries, as well as steam; but conceding that, in the case of steam boilers, the extensive and varied uses to which steam is devoted, and the comparatively slight danger arising from its use, require, on principles of public policy, which regards the interests of the great body of the people, that every owner of real property should be held to possess it subject to the right of his neighbor to erect a manufactory and employ steam on adjacent premises,

not liable. The relation of master and servant did not exist between the servant of S. and the defendants, nor, under the circumstances, did the injury result from a nuisance, erected and maintained on the defendant company's land by their consent.[37]

yet it does not necessarily follow that such owner should possess his property also subject to the right of his neighbor to erect a powder or nitroglycerine magazine in his vicinity. The existence of the manufacturing establishment, although it employs steam as a motive power, may be, and doubtless is, in many instances, a positive benefit to real property in its vicinity, and instead of diminishing may enhance its value; while, on the contrary, the erection and use of a nitroglycerine magazine could have no other than a disastrous effect on the value of all real property in its vicinity. We think, therefore, the right to maintain the former may be placed upon grounds that cannot apply to the latter. The general doctrine upon the subject stated in Fletcher v. Rylands, supra, seems to be just and fair in its general operation. The syllabus of that case, as announced by the House of Lords (L. R. 3 H. L. 330), seems to recognize a distinction in this respect between an ordinary and extraordinary use of his premises by their owner; and, had that learned tribunal then had before it a case where damages were sought on account of injuries resulting from an explosion of a steam boiler in a manufacturing establishment, it might have denied the liability in the absence of proof of negligence, on the ground that the owner was using his premises in an ordinary manner. But, whatever might have been done by the House of Lords in the case supposed, we are of opinion that the storing of nitroglycerine should be deemed to be an extraordinary and unusual use of property, and we can see no principle upon which an exception to the general doctrine laid down in Fletcher v. Rylands, *supra*, can be held to exist in favor of one who stores upon his own premises that or any other dangerous explosive. Judgment affirmed." Shauck, J., dissents.

Ordinance of a village prohibiting storage within its limits, and the transportation along its streets of dynamite or nitro glycerine in quantities larger than five quarts, being within the power conferred upon cities and villages by Ohio Rev. Stat. § 1692, subd. 33, and to regulate the transportation and keeping of gun powder and other explosive and dangerous combustibles conferred by subd. 14, of the same section is not inconsistent with §§ 6953, 8853-8857, relating to the manufacture, transportation, and storage of dynamite. Hayes v. St. Mary's, 55 Ohio St. 197, 36 Ohio L. J. 218, 44 N. E. 924 (conviction.)

37. Cuff v. Newark, etc., R. R. Co., 35 N. J. 17, syllabus to 10 Am. Rep. 205. See, Shearman & Redfield on Negligence (5th ed.) §§ 167, 173.

Explosion while gunpowder in consignee's hands for sale on commission, owners not liable. Abrahams

§ 387. **Dangerous nuisances continued—Petroleum, gasoline, naphtha, crude oils, etc.**[38]—Pipes for the transportation of dangerous explosive and inflammable substances are not *per se* a nuisance, though laid near a sewer in a city.[39] And the fact that insurance rates are thereby increased does not make an oil pipe line a nuisance.[40] But the percolations of oil in and through sewer connections and the escape of gases through a manhole thereby polluting the atmosphere, to the injury of another's property and business constitute a nuisance.[41] If the State has authorized such acts by statute neither the production nor storage of crude oil is a public nuisance nor is the storage of it on premises adjacent to or adjoining the premises of another a private nuisance *per se,* although the method of its use and the neglect to properly care for it may create a nuisance.[42] And it does not constitute a nuisance *per se* to maintain in a city storage warehouses and tanks for gasoline and carbon oil.[43]

§ 388. **Same subject continued.**—It is held that the near-by location, with relation to a dwelling house, of coal-oil and gasoline tanks is not of itself a nuisance carrying liability, even though such tanks are also near to steam railroads; there being no showing of negligence in construction or of want of care to prevent ignition from sparks from locomotives and no just ground of apprehension, as claimed, from fire and consequent injury; and the

v. California Powder Co., 5 N. M. 479, 23 Pac. 785, 8 L. R. A. 378.

38. See §§ 383-385 herein.

39. Lee v. Vacuum Oil Co., 54 Hun, 156, 7 N. Y. Supp. 426, 26 N. Y. St. R. 814.

40. State, Benton v. Elizabeth, 61 N. J. L. 411, 39 Atl. 683, 8 Am. & Eng. Corp. Cas. N. S. 745, affd. 61 N. J. L. 693, 40 Atl. 1132.

41. Brady v. Steel & Spring Co., 101 Mich. 277, 60 N. W. 687, 26 L. R. A. 175.

42. Langabaugh v. Anderson, 68 Ohio St. 131, 67 N. E. 286, 14 Am. Neg. Rep. 170, 176.

Police power of State to regulate keeping dangerous, etc., oils. See, Standard Oil Co. v. Commonwealth, 26 Ky. L. Rep. 985, 82 S. W. 1020.

As to violation of ordinance by storage in warehouses of petroleum, etc., a reasonable time. Wright v. Chicago & N. W. Co., 27 Ill. App. 200.

43. Gavigan v. Atlantic Ref. Co., 186 Pa. 604, 42 W. N. C. 465, 40 Atl. 834.

fact that the rental and salable value of the property has decreased is held insufficient.[44] But the sinking of oil wells and the storing of oil so near another person's premises that the danger of fire therefrom is imminent and continuous constitutes a *prima facie* case for a temporary injunction against operating the wells until final determination of the question of nuisance.[45] So a perpetual injunction may be granted against the drilling and operation of oil wells so near to another's dwelling in a city that he is injured in his enjoyment thereof, and also in the diminished value of adjacent property, the remedy at law being inadequate.[46] So a nuisance may be created by escaping crude petroleum from storage tanks,[47] and by oil brought from a distance escaping from pipe lines.[48] But merely permitting another to commit a nuisance does not render one liable for its consequences, and where the storage of crude oil is not of itself a nuisance to adjacent or adjoining premises and if the lessor knew that oil would be produced by drilling and stored on the leased premises, he would not be contemplating the creation or maintenance of a nuisance unless he also knew that it would be negligently stored and cared for by the lessees and the law will not presume that the lessees would be negligent.[49] If a fire originates from some unknown cause in the basement of a store where one who deals in builders' materials keeps inflammable substances of that nature he is not liable therefor where no negligence is shown.[50]

§ 389. **Dangerous nuisances continued—Spring guns.**—While the right to set spring guns in dwellings and warehouses as a protection against burglary has been sanctioned, nevertheless they

44. Harper v. Standard Oil Co., 78 Mo. App. 338, 2 Mo. App. Rep'r 221.

45. McGregor v. Camden, 34 S. E. 936.

Injunction pendente lite. See Standard Oil Co. v. Oeser, 11 App. D. C. 80, 20 Wash. L. Rep. 500.

46. Cline v. Kirkbride, 12 O. C. D. 517, 22 Ohio Cr. Ct. R. 527.

47. Berger v. Minneapolis Gaslight Co. (Minn.) 6 N. W. 336.

48. Hauck v. Tide Water Pipe Line Co., 175 Pa. 366, 26 Atl. 644, 20 L. R. A. 642, 30 W. N. C. 45.

49. Langabaugh v. Anderson 68 Ohio, 131, 67 N. E. 286, 14 Am. Neg. Rep. 170, 181.

50. Cook v. Anderson, 85 Ala. 99, 4 So. 713.

may be such an actual annoyance and injury to the public as to constitute a nuisance.[51]

§ 390. **Baseball—Ball park.**—A baseball game is not *per se* a nuisance,[52] although Sunday ball games may be co conducted or permitted to be carried on as to be both a public and private nuisance and be the ground of relief by injunction.[53] But the mere threatened operation of a ball park is not ground for equitable relief.[54]

§ 391. **Bawdy house or house of ill-repute.**—The keeping of a bawdy house is a common nuisance, as it endangers the public peace by drawing together dissolute and debauched persons; and also has an apparent tendency to corrupt the manners of both sexes by such an open profession of lewdness.[55]

51. State v. Moore, 31 Conn. 479, 83 Am. Dec. 159. See, generally, as to right as against burglars, Gray v. Combs, 7 J. J. Marsh. (Ky.) 478.

52. Alexander v. Tebeau, 24 Ky. Law Rep. 1305, 71 S. W. 427.

53. Gilbough v. West Side Amusement Co., 64 N. J. Eq. 27, 53 Atl. 289. 8 Pa. Co. Ct. R. 435.
See Seastream v. New Jersey Exhibition Co. (N. J. Eq.), 58 Atl. 532. Compare, Commonwealth v. Meyers, 8 Pa. Co. Ct. R. 435.

54. Alexander v. Tebeau, 24 Ky. L. Rep. 1305, 71 S. W. 427. Examine, Seastream v. New Jersey Exhibition Co. (N. J. Eq.), 58 Atl. 532.

55. Bacon's Abr. (7 Wilson's Ed. 1854) 223; Ely v. Niagara County Supervisors, 36 N. Y. 297. See Smith v. Commonwealth, 6 B. Mon (45 Ky.) 21 (indictable); Cranford v. Tyrrell, 128 N. Y. 341, 28 N. E. 514, 40 N. Y. St. R. 414, affg. 37 N. Y. St. R. 967, 13 N. Y. Supp. 951 (house of assignation and of ill fame; injunction lies, even though a public nuisance and subject to indictment); Anderson v. Doty, 33 Hun (N. Y.), 160 (bawdy house, held that no injunction would be awarded); Blagen v. Smith, 34 Oreg. 394, 404, 56 Pac. 292, 44 L. R. A. 522 (bawdy house is public nuisance).

As to effect of city charters, ordinances and by-laws relating to houses of ill-fame, the validity, etc., of such enactments, see McAllister v. Clark, 33 Conn. 91; Robb v. Indianapolis, 38 Ind. 49; City of Centerville v. Miller, 57 Iowa, 56, 225, 10 N. W. 293, 630; State v. Oleson, 26 Minn. 507, 5 N. W. 959; State v. Charles, 16 Minn. 474.

Visiting or being occupant of bawdy house beyond city limits, and invalidity of ordinance relating thereto, see Robb v. Indianapolis, 38 Ind. 49.

Houses of prostitution are common or public nuisances. "Their maintenance directly tends to corrupt and debase public morals, to promote vice, and to encourage dissolute and idle habits, and the suppression of nuisances of this char-

§ 392. **Bees.**—Whether the owning or keeping of bees constitutes a nuisance depends upon circumstances, but such acts do not constitute a nuisance of themselves and cannot validly be declared so by ordinance.[56] Bees may, however, from the manner of keeping them, or by reason of locality or otherwise cause such annoyance and injury as to constitute such a nuisance that damages and relief by injunction will be awarded.[57]

§ 393. **Cemeteries, burial grounds.**—Neither a private burial ground,[58] nor a public burial ground or cemetery is a nuisance *per se*. In order to constitute such places a nuisance clear proof of injury or damage from the manner of burial or other circumstances peculiar to the particular place must be shown; and the situation, relative altitude and character of the ground, the chance or reasonable probability of pollution or contamination of the atmosphere or of springs, wells or waters generally, or the danger to the physical comfort, life and health of those who reside in the neighborhood or immediate vicinity are all factors of importance and should control in the determination of the question whether there exists any nuisance.[59] So where relief is claimed to restrain

acter, and having this tendency is one of the important duties of government. The suppression of such houses, as evidenced by the stringent laws concerning them, is the public policy of the State, and their abatement is to be accomplished by any reasonable and effective means which the government shall adopt, and which does not involve a breach of the peace or the invasion of private rights," and if the place where they are is a public place, police officers have the right therein, even though *there are swinging doors* across the sole passage way leading thereto. Pon v. Wittman, 147 Cal. 280, 292, 293, per Lorigan, J.

56. Arkadelphia v. Clark, 52 Ark. 23, 11 S. W. 957.

57. Olmstead v. Rich, 53 Hun (N. J.) 638, 6 N. Y. Supp. 826, 3 Silv. Sup. Ct. 447. A right to jury trial was, however, denied in this case as not being within Code Civ. Proc. § 968. But, see, as to this point of the case, Hudson v. Caryl, 44 N. Y. 553; Lefrois v. Munroe County, 88 Hun, 109, 34 N. Y. Supp. 612.

58. Kingsbury v. Flowers, 65 Ala. 479, 39 Am. Rep. 14.

59. Kingsbury v. Flowers, 65 Ala. 479, 39 Am. Rep. 14; Los Angeles County v. Hollywood Cemetery Assoc., 124 Cal. 344, 57 Pac. 153, 71 Am. St. Rep. 75; Lakeview v. Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71; Begein v. Anderson City, 28 Ind. 79; Musgrove v. Catholic Church, 10 La. Ann. 431; Monk v. Packard,

the establishment of a cemetery the facts relied on must be stated, as a bare allegation that it is a nuisance is insufficient.[60] But drainage through a sewer from cemeteries which pollutes a stream may be enjoined as a nuisance where the water is thereby rendered unfit for domestic uses for harvesting ice and for watering stock.[61] So a tomb on private premises may be a nuisance.[62] The legislature may regulate interments of the dead,[63] and a breach of statutory prohibition as to location of a cemetery with relation to dwelling houses may be the ground for an injunction[64] But the pollution of a stream cannot be authorized by contract by a cemetery association,[65] although the facts will be considered by the court that a municipal corporation has both by formal contract and by a proper resolution permitted a cemetery to be located,[66] and where, acting within the limits of a lawful authorization so to do the bounds of a cemetery are extended by the cemetery authorities, the owner of adjacent property whose legal or conventional rights have not been invaded cannot recover for depreciation in value of such property.[67] And the unsightliness of a cemetery lot

71 Me. 309, 36 Am. Rep. 315; Braasch v. Cemetery Assoc. (Neb.), 95 N. W. 646; Clark v. Lawrence, 59 N. C. 83, 78 Am. Dec. 241; Ellison v. Washington County Comm'rs, 58 N. C. 57; Dunn v. Austin, 77 Tex. 139, 11 S. W. 1125; Jung v. Neraz, 71 Tex. 396, 95 W. 344.

Proposed use by a person of his grounds for interring therein dead bodies which would probably result in contaminating the waters of another person's wells with disease, and thus endanger the health and lives of the latter and his family, constitutes a private nuisance and may be enjoined. Lowe v. Prospect Hill Cemetery Assoc., 58 Neb. 94, 78 N. W. 488, 46 L. R. A. 237.

When nearness of cemetery does not make it a nuisance, see Elliott v. Ferguson (Tex. Civ. App.), 83 S. W. 56.

60. Begein v. City of Anderson, 28 Ind. 79. See Dunn v. Austin, 77 Tex. 139, 11 S. W. 1125.

61. Barrett v. Mt. Greenwood Cemetery Assn., 159 Ill. 385, 42 N. E. 891, 31 L. R. A. 109.

62. Barnes v. Hathorn, 54 Me. 124.

63. Lakeview v. Rose Hill Cemetery Co., 70 Ill. 191, 22 Am. Rep. 71. See Austin v. Austin City Cemetery Ass'n (Tex. Civ. App.), 28 S. W. 1023, following 87 Tex. 330.

64. Henry v. Perry Twp. Trustees, 48 Ohio St. 671, 27 Ohio L. J. 339, 30 N. E. 1122. Examine, Pfleger v. Groth, 103 Wis. 104, 79 N. W. 19.

65. Barrett v. Mt. Greenwood Cemetery Assn., 159 Ill. 385, 42 N. E. 891.

66. Musgrove v. Catholic Church, 10 La. Ann. 431.

67. Robert v. Les Cure et Marguil-

does not make it a nuisance where such condition can be remedied by proper grading and filling in.[68]

§ 394. **Cooking and cooking ranges.**—Cooking is not a nuisance *per se*, nor can it be said that the cooking of onions and cabbage is necessarily a nuisance.[69] But a cooking range or stove may be so located with relation to adjacent property or partition walls that its use injures another's property as by injuring his goods or house, driving away his customers, etc., and rendering his premises uncomfortable and disagreeable.[70]

§ 395. **Gambling house.**—All common gaming houses are nuisances in the eye of the law, as they promote cheating and other corrupt practices, and incite to idleness, and avaricious ways of gaining property, great numbers, whose time might otherwise be employed for the general good of the community.[71] And a faro gaming house is a nuisance *per se*.[72] But if no gaming is allowed therein a billiard room is not a nuisance where it is carried on in

liers, Rap. Jud. Queb., 9 S. C. 489. See, also, Dunn v. City of Austin, 77 Tex. 139, 11 S. W. 1125.

68. Woodstock Burying Ground Assoc. v. Hager, 68 Vt. 488, 35 Atl. 431.

69. Shroyer v. Campbell, 31 Ind. App. 83, 67 N. E. 193, 195. Examine, Washington Lodge, etc., v. Frelinghuysen (Mich.), 101 N. W. 569, 11 Det. L. N. 603.

70. Grady v. Wolsner, 46 Ala. 381, 7 Am. Rep. 593.

Defendant placed in his kitchen and used in business as hotel proprietor a large cooking range with a shaft for hot air which interfered with the comfort of plaintiff's house by overheating his wine cellar. It was held that, although the use by defendant of his range and shaft was perfectly reasonable plaintiff was entitled to an injunction to restrain the nuisance thereby caused. Broder v. Saillard, 45 L. J. Ch. 414, 2 Ch. D. 692, followed Reinhardt v. Mentasti, 42 Ch. D. 685, 58 L. J. Ch. 787, 61 L. T. 328, 38 W. R. 10, 40 Alb. L. J. 490.

71. Bacon's Abr. (7 Wilson's ed. 1854) 223; State v. Layman, 5 Har. (Del.) 510; Hill v. Pierson, 45 Neb. 27 Chic. Leg. N. 415, 63 N. W. 835; State v. Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478, 44 Cent. L. J. 162.

Gaming apparatus. See note 19 L. R. A. 196.

Character of evidence to warrant injunction for gaming house, see State v. Patterson, 14 Tex. Civ. App. 485, 44 Cent. L. J. 162, 37 S. W. 478.

72. State v. Doon, R. M. Charlt (Ga.) 1.

an orderly manner and the noise does not disturb the neighborhood.[73] The matter of gambling is now, however, so far under statutory prohibition that such statutes should be resorted to for the remedy.

§ 396. **Deposits on land—Garbage, ashes, offensive, etc., matter.**[74]—The unauthorized use of the premises of another in putting trash, filth and garbage upon the same, in such a manner as to interfere constantly with their reasonable and unimpeded use by the owner, and to occasion him hurt, annoyance and damage, in addition to being a nuisance is a continuing trespass which may be irreparable in damages, to avoid the consequences of which a court of equity may interfere by injunction.[74a] An injunction will also lie to restrain a nuisance consisting of deposits by defendant and others in a gully or ravine on lots owned by defendant, of refuse, particularly stable manure, rendering the premises unsanitary, compelling plaintiff in warm weather to keep his windows closed at times, and also producing cases of fever in his family, as such conditions essentially interfere with the comfortable enjoyment of life and property.[75] So, where, by change of grade of a street and the filling up of natural channels, water and refuse are discharged upon plaintiff's land, a continuing nuisance is created, an action lies in equity to abate such nuisance notwithstanding the city charter provides for filing a claim for damages and the appointment of a commission to determine the same, and also provides that no action shall be brought until after a specified period after presentment of a claim, etc., as such provisions are not applicable.[75a] And where a statute so provides, an injunction will lie at the suit of the attorney-general on the relation of the local authorities to restrain the owner of vacant land from allowing it to become or continue a public nuis-

73. People v. Sergeant, 8 Cow. (N. Y.) 139.

74. **Mining debris and deposits,** see § 277, herein.

74a. Lowe v. Holbrook, 71 Ga. 563 (suit for injunction and damages). **Preliminary restraining order** in such case. See Evans v. Wilmington & W. R. Co., 96 N. C. 45, 1 S. E. 529.

75. Percival v. Yousling, 120 Iowa, 451, 94 N. W. 913; Code § 4302.

75a. So held in Lamary v. City of Fulton, 109 N. Y. App. Div. 424.

ance or injury to health, by the accumulation thereon of refuse and filth, even though he has surrounded such land by a boarding, where people have broken up the boarding and so used the land that its condition constitutes a continuing public nuisance.[76] So evidence that offensive deposits of sewage on land had remained there at the date of the trial, and that it was reasonably necessary to remove the same in abatement of the nuisance warrants a recovery of the reasonable cost of removal.[77] But an unsightly appearance of a lot caused by depositing certain substances thereon does not of itself constitute a nuisance. There must be an injury caused by gases or "something else" coming from such deposits, which renders the enjoyment of property specially inconvenient and uncomfortable.[78] In New York, where the dock commissioners granted to the street cleaning department the authority to erect and maintain a dumping board on a crib bulkhead, and the latter department erected and maintained such dumping board and other buildings in connection with the same, and used such board and structures as a dumping place for waste paper, ashes, etc., but excluding garbage deposits; it was held that while the street at the foot of which such board and structures existed was unopened the dock department had the right to grant such permit, but the question of the right to maintain such board, etc., after the street was opened was undecided.[79] The court, per Hatch, J., said: "It is to be borne in mind that the work of the street cleaning department is a work of necessity. Upon it is dependent in a large degree the comfort, health and happiness of a large city, and it is common knowledge that some individuals must always suffer more

76. Attorney General v. Tod, Heatley (C. A., 1897), 1 Ch. 560, 66 L. J. Ch. N. S. 275, 76 Law. T. Rep. 174, rev'g 75 Law. T. Rep. 452.

77. City of Mineral Wells v. Russell (Tex. Civ. App., 1902), 70 S. W. 453 (judgment of court below for abatement of nuisance and injunction reversed).

Deposits of sewage on land, see §§ 283-286, herein.

78. Lane v. Concord, 70 N. H. 485, 85 Am. St. Rep. 643, 49 Atl. 687 (action on case).

79. Coleman v. City of New York, 75 N. Y. Supp. 342, 70 App. Div. 218, rev'g 72 N. Y. Supp. 359, 35 Misc. 664, aff'd 66 N. E. 1106 (Mem.); Laws of 1887, c. 697, as amended Laws 1888, c. 272, and Laws 1889, c. 257; Greater New York Charter, §§ 534, 542, 836. (The action was one to restrain).

inconvenience and discomfort from the performance of this public necessity than others. If the manner and method adopted in the conduct of the business does not create a nuisance, the right to conduct it must be supported. . . . We think the trial court would have failed to find that this business as conducted constituted it a nuisance, had it not been for the fact that it regarded the existence of the structure a nuisance *per se*. As we regard the structure as lawful, and the evidence as insufficient upon which to find that the conduct of the business created a nuisance it necessarily follows that the judgment should be reversed and a new trial granted."

§ 397. **Hospitals, pest-houses, infectious and contagious diseases.**—Hospitals and houses for the sick are not *prima facie* or *per se* nuisances, but they might, under some circumstances, become such,[80] and be subject to injunction for maintaining a nuisance or to restrain its continuance where the evidence is clear and certain,[81] as in cases where contagious diseases are developed.[82] While, however, the mere erecting of a pest-house, not being an unlawful thing, cannot be a nuisance *per se*, still if a method is pursued that will make it dangerous beyond that contemplated by law then it may be a nuisance; and where it is so negligently and carelessly used, or so used contrary to the intention of the law it may become a nuisance and be enjoined.[82a] So a tenement house cut up into small apartments and thickly inhabited by poor people in a filthy condition and calculated to breed diseases during the prevalence of a contagious disease is a public nuisance which may be torn down to abate it.

80. Bessonies v. City of Indianapolis, 71 Ind. 189, 195, 196. See, also, Ex parte Whitwell, 98 Cal. 73, 19 L. R. A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; Barnard v. Sherley, 135 Ind. 547, 567, 24 L. R. A. 568, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117 (a case of complaint for injunction and for damages, considered at length in § 270, herein).

81. Deaconess Home & Hospital v. Bontjes, 104 Ill. App. 484, aff'd 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215 (at instance of private individual as a private nuisance).

82. Gilford (Gifford) v. Babies' Hospital, 1 N. Y. Supp. 448, 17 N. Y. St. R. 886, 21 Abb. N. C. 159.

82a. Lorrain v. Rolling, 24 Ohio Cir. Ct. R. 82.

82b. Meeker v. Van Rensalaer, 15 Wend. (N. Y.) 397.

Again, the erection of a pest-house, or of additional buildings therefor may within substantially the same rules be enjoined where the locality is such as to seriously impair residential property values, or such as to be dangerous to the community.[83] But it is held that a temporary smallpox hospital is not a noxious or offensive business within the English Public Health Acts, 1875, § 112 (2), § 131, requiring the consent of the local authorities of an adjoining district to the establishment of such a business.[84] And on the application of the attorney-general at the relation of a local board and certain private owners of property to restrain certain acts until trial of the action there must be a sufficient showing that the danger apprehended to health from the establishment of a smallpox hospital in a certain locality will in fact ensue.[85] So, a person sick of an infectious or contagious disease, in his own house or in suitable apartments at a public hotel or boarding house is not a nuisance.[86] But a person may be indicted for carrying along a public highway a child infected with smallpox.[87]

§ 398. **Steam engines and boilers.**—A stationary steam engine is not of itself a nuisance even if erected and used in the midst of a populous city, unless it interferes with the safety or convenience of the public in the use of the streets; especially so where it is not used in connection with any trade or occupation which the law pronounces offensive or noxious; nor does it become a nuisance from the facts, singly or combined, that it is liable in common with all other steam boilers to explode and that it is used in a business in which combustible materials are necessarily

83. Baltimore v. Fairfield Imp. Co., 87 Md. 352, 40 L. R. A. 494, 39 Atl. 1081, 67 Am. St. Rep. 30; Youngstown Twp. Trustees v. Youngstown, 25 Ohio Cir. Ct. Rep. 518.

What constitutes abandonment of pest house, or hospitals for contagious diseases, and quarantine stations, by city, see Baltimore v. Fairfield Improv. Co., 87 Md. 352, 40 L. R. A. 494, 39 Atl. 1081, 67 Am. St. Rep. 340.

84. Withington Local Bd. of Health v. Manchester (C. A.) (1893), 2 Ch. 19.

85. Attorney Gen'l v. Manchester, (1893), 2 Ch. 87 (hospitals declared more beneficial to health of public than injurious).

86. Boom v. City of Utica, 2 Barb. (N. Y.) 104 (trespass on case).

87. Rex v. Vantandillo, 4 M. & S. 73.

brought in dangerous proximity to the fire of its boiler, and it therefore subjects buildings and merchandise in that vicinity to increased danger from fire, raises the premiums of insurance thereon, and excites the fears of neighboring owners for the safety and security of their property.[88] So the placing of a steam boiler upon one's own premises is in no sense a nuisance, and if, without some fault or negligence on his part, it explodes and causes injury to his neighbor he is not liable.[89] It is also held in New Jersey that the owner of a steam boiler which he has in use on his own property is not responsible, in the absence of negligence, for the damages done by its bursting.[90] Nor will the use of a steam boiler, properly constructed, be restrained as a nuisance by injunction, although situated in the dense part of a city. The apprehension of danger from improper use of a boiler is not sufficient. Injury direct and inevitable must be shown.[91] Nor is a steam engine, erected in a building situated on a street in a city, under a license from the board of aldermen, and with the safety plug required by law, a nuisance; and the landlord is not liable to third persons for any injury resulting to them from its maintenance or use by the tenant.[92] But where the obvious intention of a statute is to restrict the use of stationary engines within certain limitations by declaring their use without a license a public nuisance, this does not make the license a bar to an action for a nuisance, caused by the machinery, as distinct from the engine.[93] If a statute regulates the use of steam engines and furnaces it applies to works subsequently erected, as well as to those existing at the

88. Mayor & Council of Baltimore v. Radecke, 49 Md. 217, 33 Am. Rep. 239 (injunction to restrain removal of engine).

89. Losee v. Buchanan, 51 N. Y. 476, 10 Am. Rep. 623 (action for damages for explosion).

90. Marshall v. Welwood, 38 N. J. 339, 20 Am. Rep. 394 (suit for damages).

91. Carpenter v. Cummings, 2 Phila. 74, 13 Leg. Int. 76 (motion for special injunction).

92. Saltonstall v. Banker, 8 Gray (74 Mass.), 195 (action to recover possession of stores).

93. Quinn v. Lowell Electric Light Corp. 140 Mass. 106, 3 N. E. 200 (tort for nuisance); See Quinn v. Middlesex Electric Light Co., 140 Mass. 109, 3 N. E. 204 (action of tort for a nuisance for maintenance and use of steam engines, etc.).

time of its passage. And if the use of steam engines and furnaces has been regulated by an order of the municipal authorities, duly made and recorded, under a statutory provision, the burden is on a party who complains of the works as a nuisance to prove a non-compliance with the terms of the order or an unlawful or improper use of the works.[94]

§ 399. **Liquor nuisance—Civil and criminal actions or remedies.**—The question whether or not the sale of liquors or the keeping of a place therefor constitutes a nuisance, and the nature and form of the remedy depends almost entirely upon statute.[95]

94. Call v. Allen, 1 Allen (83 Mass.), 137, Stat. 184 S. C. 197 (bill in equity for injunction and damages).

95. Statutes as to liquor nuisance or affecting the same. See Legg v. Anderson, 116 Ga. 401, 42 S. E. 720, Act of Dec. 19, 1899; Laugel v. City of Bushnell, 96 Ill. App. 618, aff'd 197 Ill. 20, 63 N. E. 1086; ordinance under Hurd's Rev. St. c. 24, art. 5, § 1, empowering cities to declare what is a nuisance, etc.; State v. Tabler, 34 Ind. App. 393, 72 N. E. 1039, Burns Ann. Stat. 1901, § 2153; Abrams v. Sandholm, 119 Iowa, 583, 93 N. W. 563, code §§ 2347, 2384; McCoy v. Clark, 109 Iowa, 464, 80 N. W. 538, code, §§ 2408, 2410; State v. Viers, 82 Iowa, 397, 48 N. W. 732, code §§ 1523, 1543; Silvers v. Traverse, 82 Iowa, 52, 47 N. W. 888, 11 L. R. A. 804, code § 1543; Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, 22 N. W. 641, Laws 20th Gen. Assemb. c. 143, repealed by Gen. St. 1901, § 2493; State v. Wester, 67 Kan. 810, 74 Pac. 239, Gen. St. 1901, § 2463; State v. Estep, 66 Kan. 416, 71 Pac. 857, Gen. St. 1901, §§ 2463, 2493; State v. Turner, 63 Kan. 714, 66 Pac. 1008, Gen. Stat. 1901, § 2493; State v. Lord, 8 Kan. App. 55 Pac. 503, Gen. Stat. 1897, chap. 101, § 39; State v. O'Connell, 99 Me. 61, 58 Atl. 59, Rev. Stat. 1883, c. 17, § 1; Wright v. O'Brien, 98 Me. 196, 56 Atl. 647, Rev. Stat. 1883, c. 17, § 1; Davis v. Auld, 96 Me. 553, 53 Atl. 118, Pub. Laws, 1891, c. 98, Rev. Stat. c. 17; State v. Piper, 70 N. H. 282, 47 Atl. 703, Pub. St. c. 205, § 5, as amended Laws 1899, c. 81; State v. Strichford, 70 N. H. 297, 47 Atl. 262, Pub. St. c. 205, § 4; State v. Harrington, 69 N. H. 496, 45 Atl. 404, Laws 1887, c. 77; State v. Collins, 68 N. H. 299, 44 Atl. 495, Pub. St. c. 205, §§ 4, 5; Beebe v. Wilkins, 67 N. H. 164, 29 Atl. 693, Laws 1887, chap. 77, § 1; State v. Nelson (N. Dak.), 99 N. W. 1077, Rev. Codes, 1899, § 7605; State v. Donovan, 10 N. Dak. 610, 88 N. W. 717, Laws 1901, c. 178, Rev. Codes 1899, § 7605; State v. Bradley, 10 N. Dak. 157, 86 N. W. 354, Rev. Codes, § 7605; State v. McGruer, 9 N. D. 566, 84 N. W. 363, Rev. Codes 1899, § 7605, construed in connection with §§ 7594-7597; State v. Paul, 5 R. I. 185, Rev. Stat. c. 73,

Under a Georgia decision the illegal sale of intoxicating liquors is a public nuisance affecting the whole community in which the sale of it is carried on, and it may be abated by process instituted in the name of the State,[96] although it seems that a dispensary which is not a "blind tiger" within the statute is not subject to abatement or injunction even though sales are made therein in violation of the law.[97] And where there is no State statute making unlawful sales of liquors a nuisance, still, even though the sales violate the law as to illegal selling, equity will not assume jurisdiction to enjoin a dispensary carrying on such business in a certain county.[98] But a statutory proceeding lies to abate the business of a pharmacist who sells without complying with statutory requirements, even though he has a permit to effect sales of liquor for medicinal purposes.[99] So, where an express company knows the character of the property it is handling, even though shipped C. O. D., it may render itself liable for keeping a liquor nuisance under an action to enjoin under the code.[100] It is also held that

§ 3; State v. Moore, 49 S. C. 438, 27 S. E. 454, Dispensary Act, § 22; Town of Britton v. Guy (S. Dak.), 97 N. W. 1045, Rev. Civ. Code 1903, §§ 2400, 2403; State v. Chapman, 1 S. Dak. 414, 47 N. W. 411, 10 L. R. A. 432, 13 Crim. L. Mag. 228, Sess. Laws 1890, ch. 101, § 13; State v. Reymann, 48 W. Va. 307, 37 S. E. 591, Code, c. 32, § 18, as amended by Act 1897, c. 40; Hartley v. Henretta, 35 W. Va. 222, 13 S. E. 375, Code, chap. 32, § 18; State v. Collins, 74 Vt. 43, 52 Atl. 69, Acts 1898, No. 90, § 2; State v. Wassey, 72 Vt. 210, 47 Atl. 834, Act 1898, No. 90 (in connection with statutes prior thereto).

Enactment of statute—proof—character and nature of, with relation to. See McLane v. Leicht, 69 Iowa, 401, 29 N. W. 327.

Validity of statute when not in question. See State v. Jordan, 72 Iowa, 377.

96. Lofton v. Collins, 117 Ga. 434, 61 L. R. A. 150, 43 S. E. 708.

97. Cannon v. Merry, 116 Ga. 291, 42 S. E. 274, Act 1899.

98. Pike County Dispensary v. Town of Brundidge, 130 Ala. 193, 30 So. 451.

99. State v. Davis, 44 Kan. 60, 24 Pac. 73.

100. Latta v. United States Express Co. (Iowa, 1902), 92 N. W. 68, Code, § 2384. The court said in this case: "It is conceded that all the shipments were what is known as 'C. O. D.' In State v. American Exp. Co. (decided at the present term) (Iowa), 92 N. W. 66, we held that such shipments were not protected by the commerce clause of the federal constitution; that the express company was the agent of the seller for the transmutation of the title to the goods; and that its act in col-

the manufacture and sale of intoxicating liquors within the State of Iowa without a lawful permit, though for the purposes of export only, renders the manufactory a nuisance.[101] So, where within the statute a place or house where intoxicating liquors are sold at retail without a license is declared to be a public nuisance the remedy by injunction nevertheless exists.[102] And where the statute so provides, a proceeding in equity brought to enjoin a liquor nuisance is to be governed by the general rules of equity procedure; but it is not subject in every respect to the strictness of equity pleading.[103] A suit for damages also lies, as for an actionable nuisance, at the instance of near-by property owners, against a saloon established in a residential locality, including buildings devoted to religious and educational purposes.[104]

lecting the purchase price for the seller was unlawful. There is no doubt that the defendants in this case knew the character of the property they were handling, and no reason appears for not holding them liable for the nuisance created." See also Dosh v. United States Express Co. (Iowa, 1904), 99 N. W. 298. Examine 93 N. W. 571.

101. Craig v. Werthmueller, 78 Iowa, 598, 43 N. W. 606.

Where permit exists and police regulations not violated no injunction issuable. Lewis v. Behan, 28 La. Ann. 130. Examine Pearson v. International Distillery, 72 Iowa, 348. See as to legalized nuisances generally §§ 67, *et seq.*, herein.

102. Town of Britton v. Guy (S. Dak., 1904), 97 N. W. 1045 (action for injunction by town).

When equity has jurisdiction. See further, Hill v. Dunn (Iowa, 1902), 90 N. W. 705; McLane v. Leicht, 69 Iowa, 401, 29 N. W. 327. See note to § 416, herein, as to judgment, decree, orderr and statutes.

Statute may validly authorize suit in nature of equity to abate liquor nuisance. Eilenbecker v. Plymouth County Dist. Ct., 134 U. S. 31, 10 Sup. Ct. R. 424, 33 L. Ed. 801.

Conviction a prerequisite to injunction. See Hartley v. Henretta, 35 W. Va. 222, 13 S. E. 375, W. Va. Code, chap. 32, § 18.

Where statute provides certain remedies only and injunction is not one of them it will not issue. Northern P. R. Co. v. Whalen, 149 U. S. 157, 13 Sup. Ct. 822, 37 L. Ed. 686, Wash. Terr. Code, § 2059.

Second injunction for different location. See Hill v. Dunn, (Iowa, 1902), 90 N. W. 705.

As to ground for opening default judgment in proceeding to abate liquor nuisance, see State v. Casey, 9 S. D. 436, 69 N. W. 585.

103. Wright v. O'Brien, 98 Me. 196, 56 Atl. 647, R. S. (1883), c. 17, § 1, as amended by ch. 98 of Public Laws, 1891. Examine Lord v. Chadbourne, 42 Me. 429, 66 Am. Dec. 290; Black v. McGilvery, 38 Me. 287.

104. Haggart v. Stehlin, 137 Ind.

§ 400. **Same subject.**—A public and disorderly liquor and store house in a town in and about which dissolute persons are permitted, for lucre, to remain at night and in the day time, drinking, tippling, carousing, swearing, hallooing, etc., to the damage, disturbance, etc., is a public nuisance by common law and the keeper of it is indictable.[105] And if a person licensed to retail spirituous liquors causes and procures, for lucre, evil-disposed persons to congregate in and about the house in which the liquors are sold, and permits them to remain there drinking, cursing, blackguarding, fighting, etc., the house is a public nuisance, and the keeper of it is indictable.[106] But where all places where intoxicating liquors are sold, bartered, or given away, in violation of law; also all places where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage; and also all places where intoxicating liquors are kept for sale or delivery in violation of law, whether they are sold, bartered, or delivered, or not, are common nuisances under the statute; it is the illegal sale, or the illegal keeping, or the permission for persons to resort to a place for the drinking of intoxicating liquors as a beverage that makes the common nuisance, and when either one or all are proved the offense is made out.[107] And under the North Dakota statute,[108] it is not the selling, or keeping for sale, or the resorting for the purpose of drinking, that constitutes a nuisance, but it is the keeping of the place where any or all these things are done. To be the keeper of a liquor nuisance so as to subject the place to condemnation as such, the person must be an occupant under some claim of right and not a mere transient and naked trespasser therein; and under the statute the finding of intoxicating liquor

43, 22 L. R. A. 577, 29 N. E. 1073, Howard, C. J., dissenting.

105. State v. Bertheol, 6 Blackf. (Ind.) 474, 39 Am. Dec. 442 (a case of indictment).

106. State v. Mullikin, 8 Blackf. (Ind.) 260 (a case of indictment).

107. State v. Chapman, 1 S. Dak. 414, 47 N. W. 411, 13 Crim. L. Mag. 228, 10 L. R. A. 432, Dak. Sess. Laws 1890, chap. 101, § 13.

If statute prohibits in substance the sale of malt liquors or intoxicating liquors, it is absolute and does not depend upon the amount of alcohol which the malt liquor contains. State v. O'Connell, 99 Me. 61, 58 Atl. 59, Rev. Stat. 1883, c. 27, § 33, c. 17, § 1.

108. Rev. Codes, 1899, § 7605.

on the premises occupied by defendant is *prima facie* evidence of the existence of a nuisance.[109] But in that State a place of business where intoxicating liquors are sold in violation of the statute is a common nuisance whether such liquors were or were not drunk on the premises with the knowledge or consent of the seller.[110]

§ 401. **Same subject.**—Liquors need not be kept within a house to render it a nuisance where it is such under the statute, if used for the sale of intoxicating liquors.[111] But the mere erection of screens and other devices cannot be said to be as a matter of law a nuisance, no matter what the motive for their erection and maintenance may be. But the maintenance of a public place equipped with devices intended to make the violation of law comparatively safe from criminal prosecution, and in which it is well known the criminal law is systematically violated, accomplishes results which constitute a nuisance.[112] So, where several persons associate themselves together and each pays a certain sum of money to one for the purpose of having him procure and keep on hand a stock of intoxicating liquors from which each may secure a quantity, by drink or by bottle, by paying therefor, or by having the amount charged against the money previously advanced, each delivery thus made to any of such persons, either for cash or to be charged is a separate sale and the place where such business is conducted is a nuisance under the statute,[113] and the length of time intoxicat-

109. State, Kelly, States Atty, v. Nelson (N. D., 1904), 99 N. W. 1077, Rev. Codes 1899, § 7605 (equitable action prosecuted by the States attorney).

110. State, Bartlett v. Frazer, N. D. 425, 48 N. W. 343, Laws N. D. c. 110, § 13.

Owner's or agent's knowledge of sales—allegations and proof—when no variance, see State v. Collins, 74 Vt. 43, 52 Atl. 69.

111. State v. Viers, 82 Iowa, 397, 48 N. W. 732 (a case of an indictment).

112. State v. Tabler, 34 Ind. App. 393, 72 N. E. 1039. Indictment; no statute in the State making a place where liquors are sold a nuisance, *per se*. See Burns' Annot. Stat. 1901, § 2153.

113. State v. Peak, 66 Kan. 701, 72 Pac. 237 (a case of conviction). See, also, Cohen v. King Knob Club (W. Va.), 46 S. E. 799 (a case of a common and public nuisance, bill and decree).

ing liquors are kept is immaterial where the statute makes the place where they are sold or kept for sale unlawfully a common nuisance.[114] It is held that the fullest and most direct evidence is required to convict for the illegal sale of intoxicating liquors as a nuisance; and that this constitutes a sufficient answer to the objection that a statute "is inconsistent with the provisions of the Constitution securing to the accused the benefit of due process of law, and of being confronted with witnesses against him, because one may be convicted upon reputation, and upon proof that he has the facilities for committing the crime charged against him."[115]

§ 402. **Common scold.**—Under an indictment for being a common scold, it is the habit of scolding, resulting in a public nuisance, which constitutes the offense; and whether the scoldings by the defendant have been so frequent as to prove the existence of the habit, and whether the habit has been practiced under such circumstances as to disturb the public peace, are held to be questions for the jury alone.[116] In a case decided in 1829 it was held that the offense of being a common scold is not obsolete and cannot become obsolete as long as a common scold is a common nuisance, and that the offense is indictable at common law and although the punishment by ducking has become obsolete the offense still remains as a common nuisance and as such is punishable by fine and imprisonment.[117]

114. State v. Lord, 8 Kan. App. 55 Pac. 503 (a case of indictment under Kan. Gen. Stat. 1897, ch. 101, § 39).

115. State v. Paul, 5 R. I. 185, 197, Rev. Stat. C. 73, § 3.

Evidence conflicting and insufficient no injunction will issue. See State v. Gegner, 88 Iowa, 748, 56 N. W. 182.

116. Baker v. State, 53 N. J. Law. (24 Vroom) 45, 20 Atl. 858.

117. United States v. Royall, Fed. Cas. No. 16, 202 (3 Cranch C. C. 620); id. Fed. Cas. No. 16, 201 (3 Cranch C. C. 618), (a case of indictment). See further, United States v. Royall, 4 Cranch (U. S. C. C.), 620; Commonwealth v. Harris, 101 Mass 29; Commonwealth v. Foley, 99 Mass. 407; Greenwault's Case, 4 City H. Rec. (N. Y.) 174; James v. Commonwealth, 12 S. & R. (Pa.) 220; Medford v. Levy, 31 W. Va. 649, 13 Am. St. Rep. 887, 2 L. R. A. 368; Rex v. Cooper, 2 Strange 1246; Regina v. Foxly, 6 Mod. 213, 4 Black. Comm. 168.

§ 403. **Fences and structures generally.**[117a]—At common law a man could build a fence on his own land as high as he pleased, though his neighbor's light and air would be thereby obstructed.[118] So, the erection of a high board fence on one's own land is not actionable even though light and air are thereby excluded from a dwelling house, no prescriptive right existing to have light and air;[119] and structures generally may be erected by one on his own premises, even if they are small, cheap and unsightly, and they are not nuisances *per se*;[120] nor is a shed constructed on one's own land a nuisance, though it obstructs light and air;[121] nor is an unsafe ceiling in an apartment in the exclusive possession of the lessee plaintiff a nuisance;[122] nor is a standpipe a nuisance which will subject the owner to damages merely because its height makes it liable to lightning or to severe winds, or because the ground near

117a. See §§ 233 *et seq.*, herein.

118. Rideout v. Knox, 148 Mass. 368, 372, 19 N. E. 390, 2 L. R. A. 81, 12 Am. St. Rep. 560; Lord v. Langdon, 91 Me. 221, 39 Atl. 552. See §§ 36, 37, 236, herein.

That one has a right to erect fences on his own land and that they are not a nuisance per se, see Anthony Wilkinson Live Stock Co. v. McIlquam (Wyo. 1905), 83 Pac. 364.

119. Guest v. Reynolds, 68 Ill. 471, 18 Am. Rep. 570. See Housel v. Conant, 12 Ill. App. (12 Bradw.) 259; Russell v. State, 32 Ind. App. 243, 69 N. E. 482; Brostrom v. Lauppe, 179 Mass. 315, 60 N. E. 785; Spaulding v. Smith, 162 Mass. 543, 39 N. E. 189; Pickard v. Collins, 23 Barb. (N. Y.) 445.

As to easements of light and air, see §§ 36, 37, herein.

120. Flood v. Consumers Co., 105 Ill. App. 559; Truelock v. Morte, 72 Iowa, 510, 34 N. W. 307; Falloon v. Schilling, 29 Kans. 292, 44 Am. Rep. 642. See Hagerty v. McGovern, 187 Mass. 479, 73 N. E. 536; Stilwell v. Buffalo Riding Academy, 21 Abb. N. C. (N. Y) 472, 4 N. Y. Supp. 414.

121. Lovell v. Noyes, 69 N. H. 263, 46 Atl. 25, Pub. Stat. c. 143, §§ 28, 29.

122. Kushes v. Gunsberg, 99 App. Div. 417, 91 N. Y. Supp. 216 (a case of action for damages).

"What may be a nuisance as to others may not be a nuisance to ones lessee . . . To constitute any particular thing a legal nuisance *per se*, apart from statute nuisances, as between lessor and lessee and the servants of the lessee, the thing itself must work some unlawful peril to health or safety of person and property,—as defective cesspools, imperfect sewers and drains, walls and chimneys liable to fall, unguarded excavations, etc." Whitmore v. Oronto Pulp & P. Co., 91 Me. 297, 307, 39 Atl. 1032, 64 Am. St. Rep. 229, 40 L. R. A. 377, per Emery, J. (a case of machinery and fixtures as between lessor and lessee or servant).

by is made unhealthy;[123] nor is a platform in an alley in the rear of a store a nuisance *per se*;[124] nor will the erection of a jail be restrained;[125] and a bill board is held not to be an abatable nuisance merely because a city ordinance so provides,[126] and its destruction may be enjoined until a hearing is had.[127]

§ 404. **Same subject continued.**—A remedy exists, where structures erected on an alley are nuisances *per se*,[128] to restrain building a mill;[129] where there is a projecting or overhanging wall;[130] where a public nuisance is created by enclosing and obstructing public free school lands;[131] where a barbed wire fence constitutes a dangerous structure as to stock running in a pasture;[132] where the statute gives a right of action where a fence nuisance is maliciously erected and which interferes with the comfort and enjoy-

123. Whitfield v. Carrollton, 50 Mo. App. 98.

124. Bagley v. People, 43 Mich. 355, 38 Am. Rep. 192.

125. Burwell v. Vance County, 93 N. C. 73, 53 Am. Rep. 454.

126. As to legalized and statutory nuisances generally, see §§ 67 *et seq.*, herein.

127. Gunning System v. Buffalo, 71 N. Y. Supp. 155, 62 App. Div. 497.

Motive to annoy must be shown where structure or sign board is claimed as nuisance under Laws 1887, c. 91, Hunt v. Coggin, 66 N. H. 140, 20 Atl. 250 (action on case). See § 43, herein, as to motive or intent in general.

As to belief of party that act lawful in erecting fence on highway, see Dyerle v. State (Tex. Civ. App.), 68 S. W. 104; Kaney v. State (Tex. Civ. App.), 68 S. W. 104.

128. Ellis v. American Academy of Music, 120 Pa. St. 608, 15 Atl. 494 (action on the case).

129. Phillips v. Stocket, 1 Overton (Tenn.), 200. See § 318, herein.

130. Meyer v. Melzler, 51 Cal. 142; Langfeldt v. McGrath, 33 Ill App. 158 (law imported damage). See Keeler v. Lederer Realty Corp., 26 R. I. 524, 59 Atl. 855.

131. State, Templeton v. Goodnight, 70 Tex. 682, 11 S. W. 119 (petition for mandatory injunction).

Cases of unlawful inclosure of government lands are not applicable, where none of defendant's fences will prevent or obstruct free passage or transit over, or through such public lands, or the right of any person to peaceably enter upon the same and settle thereon, or enjoy them in any manner authorized by law. Anthony Wilkinson Live Stock Co. v. McIlquam (Wyo. 1905), 83 Pac. 364.

132. Winkler v. Carolina & N. W. R. Co., 126 N. C. 370, 35 S. E. 621, 78 Am. St. Rep. 663 (civil action for damages).

ment of another's estate, or diminishes his rents and injures his chances of rental, and so even though under some circumstances the owner is not actually occupying the premises;[133] and where one erects upon his own land a board fence designed for no purpose of either ornament or use, and so close to a house on an adjoining lot as to exclude light and air from the windows of the house and thus become a nuisance, an injury and damage to said house, and the only purpose in erecting the fence is to injure the neighbor and his property, and it is erected from motives of unmixed malice towards the neighbor, who is damaged thereby, such person will be enjoined from maintaining such a fence.[134]

§405. **Water-closets, privies, vaults and outhouses.**[135]—Properly constructed water-closets and other water fixtures are not nuisances.[135a] So, a privy, as an accessory to a well-ordered residence, is not a nuisance *per se*, but may become so under some circumstances. The question whether it is a nuisance is a question of fact dependent upon the evidence.[136] One may not maintain a privy which percolates into his neighbor's well and renders it foul and unfit for use.[137] And an injunction will lie to prevent the erection of a privy within a few feet of an adjoining owner's well and of her dining room and family bedroom, such privy being obnoxious in itself and calculated by its use to make

133. Smith v. Morse, 148 Mass. 407, 19 N. E. 393, Stat. 1887, c. 348, § 2 (actions of tort).

Statute within police power and constitutional which makes erection of fence of certain height a private nuisance when made to annoy. See Rideout v. Knox, 148 Mass. 368, 2 L. R. A. 81, 19 N. E. 390, 12 Am. St. Rep. 560 (action of tort).

134. Kessler v. Letts, 7 Ohio Cir. Ct. R. 108. See, also, Peek v. Roe, 110 Mich. 52, 3 Det. L. N. 291, 67 N. W. 1080 (board fence subserved no useful purpose and rendered house damp and unhealthy); Kirkwood v. Finegan, 95 Mich. 543, 55 N. W. 457; Flaherty v. Moran, 81 Mich. 52, 45 N. W. 381, 8 L. R. A. 183; Burke v. Smith, 69 Mich. 380, 37 N. W. 838 (mem. in decision: "In this case the decree below being affirmed by an equal division of the court, nothing is decided"); Peck v. Bowman, 22 Wkly. L. Bull. 111, 10 Ohio Dec. 567.

135. See § 314, herein.

135a. Allen v. Smith, 76 Me. 335 (action on case).

136. Teinen v. Lally, 10 N. D. 153, 86 N. W. 356 (action to abate).

137. Haugh's Appeal, 102 Penn. St. 443, 48 Am. Rep. 193 (bill for injunction).

the plaintiff's residence almost if not quite unbearable as well as unhealthy, and to endanger the health and lives of plaintiff and family.[138] So the erection of a privy with a cemented vault within three and one-half feet of the dining room of an adjoining lot owner will be enjoined as a nuisance without reference to the manner in which the vault is constructed or to the intention of the one constructing it to use disinfectants.[139]

§ 406. **Same subject continued.**—So a privy vault close to a cellar wall of a store from which offensive matter percolates through the privy wall, the soil, and into the cellar is a nuisance which must be abated by adopting a course to prevent the escape of such filth.[140] Equity may also compel the removal of offensive outhouses offensively near a dwelling house;[141] and it may also enjoin the maintenance of a defective closet and cesspool and order the recovery of adequate damages.[142] So equity will restrain the draining of public school privies into a stream flowing through a public community.[143] But in case an owner of property fails to remove an alleged nuisance consisting of filthy privies on premises occupied by tenants under a lease, if such offense is not made a misdemeanor or penal offense by statute in express terms, it cannot be implied by the possible or probable intention of a legislative body to so make it. Criminal offenses cannot be created by implication.[144] In an English case where an application was made under § 305 of the Public Health Act of 1873 to a court of summary jurisdiction for an order authorizing a local authority to enter upon premises for the purpose of making a sufficient water-

138. Miley v. A'Hearn, 13 Ky. L. Rep. 834, 18 S. W. 529.

139. Radican v. Buckley, 138 Ind. 582, 38 N. E. 53.

140. Perrine v. Taylor, 43 N. J. Eq. 128, and note, 12 Atl. 769 (bill in equity).

141. Cook v. Benson, 62 Iowa, 170, 17 N. W. 470.

142. Finkelstein v. Huner, 79 N. Y. Supp. 334, 77 App. Div. 424, aff'd 179 N. Y. 548, 71 N. E. 1130.

143. Board of Health of New Brighton v. Casey, 18 N. Y. St. R. 251, 3 N. Y. Supp. 399. See Commonwealth v. Yost, 11 Pa. Super. Ct. 323.

144. Waggaman v. District of Columbia, 16 App. D. C. 207; Act Cong. Jany. 25, 1898 (30 Stat. 231), § 16 (error to police court, judgment reversed).

closet, in pursuance of the powers given by § 36, it was held that the court had no jurisdiction to entertain an objection by the owner of the premises that such entry was unnecessary because they were already provided with sufficient sanitary appliances.[145]

§ 407. **Dams—Civil and criminal remedies.**—Equity will not interfere to prevent the continuance of a mill dam though by the erection thereof waters have been caused to flow back upon and overflow plaintiff's land where the damages are of a trifling and merely nominal character, but will leave the parties to their remedy at law.[146] And no action lies for erecting a dam and causing the water to flow back in the bed of a stream, causing an alleged nuisance, unless actual injury has been sustained.[147] But where the circumstances justify such action a perpetual injunction will lie to restrain the renewal of a dam which has been abated and repaired,[148] and a remedy also exists where a person's health or that of his family are injured;[149] where a dam and reservoir are negligently constructed and maintained.[150] But a dam obstructing the passage of fish was not indictable at common law.[151] In an early Indiana case an indictment was filed against certain persons composing the trustees of the Wabash and Erie canal for a nuisance in erecting a feeder dam, etc., which was part of the canal. The dam was erected under a statute to pro-

145. Robinson v. Sunderland Corp. (1899), 1 Q. B. 751, 68 L. J. Q. B. N. S. 330.

146. McCord & Hunt v. Iker, 12 Ohio, 387.

As to dams generally, see §§ 319-327, herein.

147. Cooper v. Hall, 5 Ham. (Ohio) 320 (action on the case).

When equity will not enjoin dam. See City of Rockland v. Rockland Water Co., 86 Me. 55, 29 Atl. 935.

Threatened epidemic from polluted water held by dam. See City of New Castle v. Raney, 6 Pa. Co. Ct. R. 87, id. 130 Pa. 546, 20 Pitts. L. J. N. S. 345, 6 L. R. A. 737, 25 W. N. C. 246, 47 Phila. Leg. Int. 415, 27 Am. & Eng. Corp. Cas. 566, 18 Atl. 1066.

148. Stevens v. Stevens, 11 Metc. (Mass.) 251, 45 Am. Dec. 203.

149. Story v. Hammond, 4 Ohio (4 Ham.), 376 (action on the case for special damages in consequence of a mill-dam).

150. Aldworth v. Lynn, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210, 25 Am. St. Rep. 608 action for damages).

151. Commonwealth v. Chapin, 5 Pick. (Mass.) 199, 16 Am. Dec. 386.

vide for the funded debt of the State and for the completion of said canal to Evansville. No act of wantonness was shown in the erection of the dam, and it was held that the indictment should not be sustained.[152]

§ 408. **Private way, right of way.**—The rule that equity will enjoin an obstruction that reaches to the substance and value of the estate, and goes to the destruction of it in the character in which it is enjoyed, applies to an obstruction in an alley which destroys a conceded right of way.[153] So the obstruction of a private way is a private nuisance and actionable in a proper proceeding,[154] and a right of way to which a permanent and continuous injury is threatened may be protected in equity by abatement of such private nuisance.[155] But a nuisance on a town's private right of way is not indictable.[156]

§ 409. **Other special instances of what is subject-matter of remedy.**—A disorderly and disreputable theatre may be enjoined although a common nuisance.[157] So may a prize fight;[158] a cigar store where a slot machine is used;[159] the use of a piano at night in a saloon when combined with noise of customers and dancing;[160] feed-lots constituting a nuisance;[161] uncovered sand piles close by a residence;[162] the explosion in gas wells of nitro-glycerine near dwelling houses;[163] and while gas wells are not nuis-

152. Butler v. The State, 6 Ind. 165.

153. Schaidt v. Blaul, 66 Md. 141, 5 Cent. Rep. 580, 6 Atl. 669.

154. Holmes v. Jones, 80 Ga. 659, 7 S. E. 168; Salter v. Taylor, 55 Ga. 310; Code; Dries v. St. Joseph, 98 Mo. App. 611, 73 S. W. 723 (action for damages).

155. Cadigan v. Brown, 120 Mass. 493.

156. Commonwealth v. Low, 3 Pick. (Mass.) 409.

157. Reeves v. Territory, 13 Okla. 396, 74 Pac. 951; Wilson's St. 1903, §§ 1959, 2302, 2340, 2614, 2650, 3717, 3718, 3724, 2725, 3727, 4440.

158. Commonwealth v. McGovern, 25 Ky. L. Rep. 411, 75 S. W. 261, Ky. Stat. § 1289.

159. Lang v. Merwin, 99 Me. 486, 59 Atl. 1021.

160. Feeney v. Bartoldo (N. J. Eq.), 30 Atl. 1101.

161. Baker v. Bohannan, 69 Iowa, 60.

162. Dunsbach v. Hollister, 2 N. Y. Supp. 94, 49 Hun, 352, 17 N. Y. St. R. 461, aff'd 132 N. Y. 602, 44 N. Y. St. R. 934, 30 N. E. 1154.

163. People's Gas Co. v. Tyner, 131 Ind. 277, 31 N. E. 59, 16 L. R. A. 443. See §§ 382 et seq., herein.

ances *per se*, yet whether they are nuisances to a dwelling house and its appurtenances depends upon their location, capacity and management. Therefore where a gas well has such capacity, management and location with regard to a dwelling house and its appurtenances as to materially diminish the value thereof as a dwelling and seriously interfere with its ordinary comfort and enjoyment it is an abatable nuisance. If, however, there is any way that such a well can be operated so as not to make it such a nuisance, only the unlawful operation thereof will be enjoined.[164]

§ 410. **Same subject continued.**—An easement to lands under tide waters may be protected.[165] And if a wharf built or threatened to be built, upon tide lands, or below the line of low water without public authority, is or would be injurous to commerce or navigation, and proceedings at law would not be adequate to the emergency, the erection may be abated or enjoined in equity, but where the wharf is not, or would not be attended with any such result, the equitable jurisdiction will fail and the legal remedy must be resorted to.[166] An injunction also lies to restrain the wrongful flooding of lands of another,[167] and to prevent the corruption of waters,[168] or their pollution by sewage.[169] In an English case where relief by injunction was sought against the discharge of sewage into certain waters and one of the questions was whether the nature and extent of the nuisance, present or prospective, was such as to justify the court's interference and prevent the discharge, the court, per Turner, L. J., said: "This brings us to the question whether the nature or extent of the nuisance in this case is such that this court ought to interfere by injunction to prevent it. I have throughout felt this point to be one

164. McGregor v. Camden, 47 W. Va. 193, 34 S. E. 936. See §§ 382 et seq., herein.

165. Stockham v. Browning, 18 N. J. Eq. 390.

166. People v. Davidson, 30 Cal. 379, 389. See § 275, herein.

167. Learned v. Castle, 78 Cal. 454, 21 Pac. 11, 18 Pac. 872. See §§ 278, 313, herein.

168. Richmond Manufacturing Co. v. Atlantic De Laine Co., 10 R. I. 106, 14 Am. Rep. 658. See § 303, herein.

169. Mason v. City of Mattoon, 95 Ill. App. 525. See Cilly v. Cincinnati, 7 Ohio Dec. Reprint, 344. See §§ 280 et seq., herein.

of some difficulty. I adhere to the opinion which was expressed by one of the Lord Chancellors in The Attorney-General v. The Sheffield Gas Company,[170] that it is not in every case of nuisance this court will interfere. I think that it ought not to do so in cases in which the injury is merely temporary and trifling, but I think that it ought to do so in cases in which the injury is permanent and serious; and in determining whether the injury is serious or not, I think regard must be had to all the consequences which may flow from it. In this particular case I think regard must not merely be the comfort or convenience of the occupier of the estates, which may only be interfered with temporarily and in a partial degree, but that regard must also be had to the effect of the nuisance upon the value of the estate, and upon the prospect of dealing with it to advantage, and I cannot but think that the value of this estate, and the prospect of advantageously dealing with it, is and will be affected by the continuance of this nuisance. Upon this ground and upon the ground that of the water of the brook being rendered unfit for the use of the tenants and occupiers of the estate, I think that the interference of the court was due." [171]

§ 411. **Other special instances of what is not subject-matter of remedy.**—An action for damages resulting from a nuisance cannot be maintained because the branches of a tree, not poisonous or noxious in its nature upon the land of the defendant, overhang the plaintiff's land; in the absence of proof that real and actual damage has been sustained,[172] or that personal enjoyment is lessened.[173] But if such injury or injuries would be sustained an injunction will issue to prevent the planting of trees along a boundary line.[174] The growth of weeds is not a nuisance in itself

170. 3 D. M. G. 304, 1 W. R. 185.

171. Goldsmid v. Tunbridge Wells Improvement Commissioners, 35 L. J. Ch. 382, L. R. 1 Ch. 349, 12 Jur. (N. S.) 308, 14 L. T. 154, 14 W. R. 562, per Turner, L. J.

172. Countryman v. Lighthill, 24 Hun (N. Y.), 405.

173. Grandona v. Lovdal, 78 Cal. 611, 21 Pac. 366.

174. Brock v. Connecticut & P. R. Co., 35 Vt. 373.

Trees on highways, as nuisances and right of municipality to remove. See §§ 252, 253, herein.

justifying an injunction;[175] and a railroad terminal yard will not be generally enjoined;[176] nor will equity, at the suit of a private party, enforce by injunction a penal statute as to Sunday labor, where the remedy by criminal prosecution is adequate;[177] nor is a garage or automobile station at a summer resort outside of the restricted portion of the premises a nuisance where such business is lawful and legitimate;[178] nor will a garbage crematory be enjoined where carried on under contract providing that it shall not be a nuisance.[179] Nor are hen houses, and a yard connected therewith, nor the odors arising therefrom, accompanied with the cries of the occupants a nuisance, where although they may have been unpleasant, yet they were not physically uncomfortable or unbearable to persons of ordinary health and sensitiveness or peculiarly irritating even to sensitive persons, especially where such hen houses are maintained in a cleanly condition and cared for in such a manner as not to affect injuriously the health of any normal person living in the neighbourhood and the conditions existing on the premises of defendant were not shown to be abnormal or to have differed substantially from those usually found where barnyard fowls are kept.[179a] Nor are dead animals nuisances *per se* and cannot be made such by legislative declaration, and while a municipality is clothed with ample authority, in the exercise of its public power, to protect the public against nuisances *per se*, or anything that is likely to become an offensive and dangerous nuisance, it cannot in the absence of such conditions deprive the owner of his property in the carcass of a dead domestic animal without due process of law.[179b]

175. Harndon v. Stultz, 124 Iowa, 734, 100 N. W. 851.

176. Georgia Railroad & Bkg. Co. v. Maddox, 116 Ga. 64, 42 S. E. 315.

177. Sparhawk v. Union Pass. Ry. Co., 54 Pa. 401.

178. Stein v. Lyon, 91 App. Div. 593, 87 N. Y. Supp. 125.

179. Deysher v. Reading, 18 Pa. Co. Ct. 611.

As to burning dead bodies being a nuisance, see Reg. v. Price, 12 Q. B. D. 247, 15 Cox C. C. 389, 33 Wkly. R. 45, 52, 53 L. J. M. C. 51.

179a. Wade v. Miller, 188 Mass. 6, 73 N. E. 849 (injunction refused).

179b. City of Richmond v. Caruthers, 103 Va. 774, 50 S. E. 264.

§ 412. **Same subject continued.**—The purchaser of lands, who, in working mines thereon, strikes an abandoned mine of the existence of which he had no knowledge and inconsequence thereof has his mine flooded, cannot sustain an action for a nuisance but only for a trespass, where it appears that such abandoned mine was one existing by reason of a prior lessee of adjoining premises working over the line.[180] And where the water in the channel of a stream is stagnant, even if it is a menace to the public health, a court of equity will refuse its aid in compelling certain work to be undone where such method would be wholly impracticable and ineffectual to afford relief from the conditions existing and might result in injury to another part of the public and complainants show no special damage separate and apart to them from that sustained by the public, and the question is not one of abating a nuisance to the public health.[181]

§ 413. **Other special instances of when and for what indictment lies.**—Indictment or information lies for a public nuisance,[182] in behalf of the public,[183] by the attorney-general or solicitor-general.[184] And the fact that a penalty is provided by statute for acts constituting a nuisance does not take away the common law right of the public to have the offender indicted and the nuisance removed.[185] So a statute may be broad enough in its terms to

180. Williams v. Pomeroy Coal Co., 37 Ohio St. 583. See § 277, herein.

181. McKee v. City of Grand Rapids (Mich., 1904), 100 N. W. 580, 11 Det. L. N. 259. See § 305, herein.

182. People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152.

183. Walker v. McNelly, 121 Ga. 114, 48 S. E. 718; Commonwealth v. Clarke, 1 A. K. Marsh (Ky.), 323, Charlotte v. Pembroke Iron Works, 82 Me. 391, 8 L. R. A. 828, 19 Atl. 902.

Meaning of "public." See Jones v. City of Chanute, 63 Kan. 243, 65 Pac. 243.

If inhabitants of three houses only are affected by offensive trade it is insufficient for indictment. Rex v. Lloyd, 4 Esp. 200.

184. People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 4 Pac. 1152, 56 Am. Rep. 80; Walker v. McNelly, 121 Ga. 114, 48 S. E. 718; Attorney General v. Jamaica Pond Aqueduct Corp., 133 Mass. 361.

185. Rennock v. Morris, 7 Hill (N. Y.), 575; State v. Woodbury, 67 Vt. 602, 32 Atl. 495. See Cincinnati Railroad Co. v. Commonwealth, 80 Ky. 137; State v. Plunkett, 18 N. J. L. 5. Examine State v. Proctor, 90 Mo. 334, 2 S. W. 472.

include as indictable all indictable nuisances under the common law.[186]

§ 414. **Same subject continued.**—So an indictment or information lies for obstruction of navigable waters,[187] without reference to the quality of navigation or the amount of damage;[188] for the obstruction of a public highway or impeding travel thereon;[189] where a fruit stand encroaches upon a public city street;[190] for a nuisance in erecting buildings near the highway and dwelling houses, and there making acid spirit of sulphur whereby the air is impregnated with noisome and offensive stinks to the common nuisance of all inhabiting and passing;[191] for an advertisement needlessly alarming the public;[192] for matters offensive to the senses, though not injurious to health;[193] for inflicting punishment on a servant;[194] for a pantomime which is an offense against common decency within the statute;[195] and indecent exposure in public places.[196] So showing and keeping for exhibition a stud horse in the streets of a town is a public nuisance.[197] And profane language under certain circumstances may become a public nuisance

186. State v. De Wolfe (Neb.), 93 N. W. 746.

187. Georgetown v. Alexandria Canal Co., 12 Pet. (U. S.) 91. See §§ 272 et seq., herein.

188. Attorney Genl. v. Londsdale, 38 L. J. Ch. 335, 17 W. R. 219, L. R. 7 Eq. 377, 20 L. T. 64.

189. Salter v. People, 92 Ill. App. 481; Cr. Code, § 221; Commonwealth v. Allen, 148 Pa. 358, 16 L. R. A. 148, 53 Atl. 1115; Commonwealth v. Christie, 13 Pa. Co. Ct. 149; State v. Wolfe, 61 S. C. 25, 39 S. E. 179; Cr. Code, § 365. See §§ 212 et seq., herein.

Code penalty not recoverable in injunction suit—obstruction of highway. Sierra County v. Butler, 136 Cal. 547, 69 Pac. 418; Pol. Code, § 2737.

190. State v. Berdetta, 73 Ind. 185, 38 Am. Rep. 117. See §§ 233-235, herein.

191. Rex v. White, 1 Burr, 333. See chapters 7 and 9, herein.

192. State v. Cassidy, 6 Phila. 82.

193. Rex v. Neil, 2 Car. & P. 485, 31 R. R. 685.

194. Hickerson v. United States, 2 Hayw. & H. 228, Fed. Cas. No. 18,301.

195. People v. Doris, 14 App. Div. (N. Y.) 117, 43 N. Y. Supp. 571.

196. People v. Butler, 4 Hun (N. Y.) 636; Sidney's Case, 1 Sid. 168. See Miller v. People, 5 Barb. (N. Y.) 203; Rex. v. Orchard, 3 Cox's Cr. C. 248.

197. Nolin v. Town of Franklin, 4 Yerg. (Tenn.) 163 (judgment for penalty under corporation law affirmed).

but is not ordinarily one.[198] But one of several hog-pens in a neighborhood is not a ground for conviction because it contributed in part to the alleged nuisance.[199] Again, borough officers empowered to abate a nuisance may be indicted for neglect to abate a sewer nuisance.[200] But public picnics and dances are not in their nature nuisances and are not common law nuisances and a village ordinance declaring them such, where they are not so in fact and irrespective of their character is void.[201] The merely carrying on of an offensive trade is not an indictable nuisance unless it is destructive to the health of the neighborhood or renders the houses uncomfortable or untenantable.[202] Nor is Sunday barbering indictable,[203] although the business of butchering may be, even though punishable by statute.[204]

198. Commonwealth v. Linn, 158 Pa. 22, 24 Pitts. L. J. N. S. 122, 22 L. R. A. 353, 33 W. N. C. 331, 27 Atl. 843.

199. Gay v. State, 90 Tenn. 645, 18 S. W. 260. See § 208, herein.

200. Commonwealth v. Bredin, 165 Pa. 224, 30 Atl. 94, 26 Pitts, L. J. N. S. 29, Pa. Gen. Borough Act, 1851, § 2, subs. 13. See §§ 330-358, herein.

201. Des Plaines v. Poyer, 123 Ill. 348, 14 N. E. 677, 12 West Rep. 760, 5 Am. St. Rep. 524 (appeal from criminal court).

As to exhibitions, plays, sports, etc., see §§ 109, 115, 123, 125, herein.

Municipal powers and liabilities, see chapter 15, herein.

202. Rex v. Davey, 5 Esp. 217.

203. State v. Lorry, 7 Baxt. (Tenn.) 95, 23 Am. Rep. 555.

204. State v. Woodbury, 67 Vt. 602, 32 Atl. 495; Rev. L. § 3923.

Slaughter houses. See §§ 126-129, herein.

CHAPTER XIX.

Remedies Continued—Parties, Defenses and Damages.

SUBDIVISION I.

ESSENTIALS OF JURISDICTION AND REMEDY.

Section 415. Essentials of equitable jurisdiction, remedy or relief.
416. Same subject—Rulings and instances.
417. Whether establishment at law of right a prerequisite to equitable relief.
418. Same subject—Early rulings and instances.
419. Prospective or threatened nuisance—Apprehended injury.
420. Same subject—Other statements or forms of rule.

§ 415. Essentials of equitable jurisdiction, remedy or relief.—Outside of those statutes which confer equitable jurisdiction or give an equitable remedy or relief, as may be instanced by the case of a liquor nuisance,[1] the controlling principles are that equity will

1. See §§ 365, 399-401, herein.

Statutory remedy followed—Equitable relief denied. — "The bill is to have certain buildings in the city of Pittsburgh, adjoining Second avenue, declared to be a public nuisance, and to require defendants to put them in safe condition or remove them.

"Findings of Fact.—1. The bill was filed June 11, 1904, and at that time defendants were and still are the owners of a row of frame buildings on the line of Second avenue, which are three stories in height in front and one story in the rear, occupying practically all the space between the street and the hill. These houses are framed together and are under one roof, but form eight separate dwellings. When originally built they were two stories in height, but many years ago Second avenue was cut down a considerable number of feet, and a third story was built under the building as it existed before the cut. 2. No evidence was offered showing the exact date at which these houses were built, but they are not less than 75 years old, and perhaps considerable more. No repairs have been put upon any of these houses for eight or ten years. The roof is so far decayed as to let water into every part of the premises. The building is out of plumb about one inch at one end and somewhat less at the other. A part of the

interfere where the injury or mischief are irreparable and there exists no adequate remedy at law or no redress at law wherein the damages can be admeasured, or where there can be no adequate compensation in damages, or where such exercise of jurisdiction is necessary to prevent multiplicity of suits, or oppressive, protracted, expensive and interminable litigation. An injunction

stone wall under the one end of the houses has fallen down. The front of the houses is supported by posts, which are re-inforced by a stone wall built between the posts. About the middle of the row (which is about 100 feet long), in the rear, water from the hill has undermined part of the wall which supported the third story, and caused about 30 feet in length of the row to sink some feet, and broken the floors and partitions at this place. Between each of the eight tenements, there is a large brick chimney, which helps to support the buildings, and one of these chimneys has sunk so as to break the floors and partitions near it. 3. At the time of the filing of the bill, the house was and had been for many years inhabited by a very low class of people, most of them being tenants of single rooms, and the place had long had a very bad reputation as the resort of thieves and prostitutes, and has been known for many years as the 'yellow row.' At the time of the hearing it appeared that the inhabitants had all been driven out by the police, and the house is now practically uninhabited, and by reason of the state of dilapidation above described, it is not fit for human habitation. 4. The bill is founded upon the claim that the building is liable to collapse at any time, and thereby endanger the lives of passersby on the street, which is much travelled. We are unable to find from the evidence that there is any danger of the house falling upon the street. The uncontradicted evidence is that the house is framed with white pine in the old-fashioned way, with mortises and tenons, and the timbers reasonably sound, and the building very little out of plumb considering its height and age. 5. The building inspectors of the city of Pittsburgh examined the building in question and condemned it as dangerous to the public, and notified John Nicholson, Jr., one of the defendants, and the only one upon whom notice could be readily served, of their action, and requested the defendants, through him, to put the building in safe condition.

"Conclusions of Law.—First. The bill is not founded, as we understand it, upon any statute authorizing cities to condemn buildings or to oversee the condition of buildings and structures within the city, but is founded merely upon the general power and duty of the city to take proper proceedings for the abatement of nuisances on or adjoining the public streets by which the safety of the public using the same is threatened. It is the duty of the city to see that the streets are safe for public travel, and if a building or structure adjoining or near to a

may, however, issue in case of a nuisance *per se*, or to prevent a serious injury to health, or in case of imminent danger or where the nuisance is a continuing or constantly recurring one. But it is also determined in numerous cases that the right and the injury should be established by satisfactory evidence; that is, the right should be clear, manifest and strongly established and not doubtful, probable, contingent, consequential, remote, uncertain, speculative or merely apprehended; and that the injury or damage should be real, material, substantial, serious, exceptional, certain, immediate and the danger imminent; or, as some of the courts express it, there should be a strong case of urgent or pressing necessity.[1] It is further declared that equity will exercise caution in abating or enjoining a nuisance.[2]

street is in such condition that there is reasonable apprehension of danger that it will fall upon the street, it is undoubtedly the right and the duty of the city to take measures to have the nuisance abated. An action at law, would, of course, furnish no adequate remedy under the circumstances, and a bill in equity would appear to be the appropriate remedy for the city upon such a case. Having found, however, that the city failed to show that the building in question is likely to fall or that there is any substantial danger of its falling upon the street, it follows that the city is not entitled to a decree in this case that the building be removed or torn down. As to the fact that the building is unfit for human habitation, we are of opinion that the city is not in this form of proceeding entitled to any relief, but that if the condition of the building offends against police regulations as to tenements the remedy provided by such statutory regulations must be followed. We are of opinion, therefore, that the bill must be dismissed." Opinion per Shafer, J. City of Pittsburgh v. Nicholson, 36 Pitts. Leg. J., N. S. (53 O. S.) 185.

Nature and form of remedy—Statutes. See §§ 362, 365-367, herein.

2. Dennis v. Mobile & M. Ry. Co., 137 Ala. 649, 35 So. 30; Wright & Rice v. Moore, 38 Ala. 593, 82 Am. Dec. 731 (continuing diversion of water); Rosser v. Randolph, 7 Port (Ala.), 238, 31 Am. Dec. 712 (erection of a mill); State v. City of Mobile, 5 Port (Ala.), 279, 30 Am. Dec. 564; Peterson v. Santa Rosa, 119 Cal. 387, 51 Pac. 557; Yolo County v. City of Sacramento, 36 Cal. 193 (obstruction of navigable waters. If remedy inadequate or imminent danger of irreparable mischief equity will interfere); Middleton v. Franklin, 3 Cal. 238 (erection of steam engine, machinery and grist mill in cellar under store); Morgan v. Danbury, 67 Conn. 484, 35 Atl. 499 (sewage in river); Gray, Thomas, v. Baynard, 5 Del. Ch. 499; Harlan & H. Co. v. Pas-

§ 416. Same subject—Rulings and instances.—Chancery has the right to exercise jurisdiction in cases of nuisance in restrain-

chall, 5 Del. Ch. 435 (obstruction to navigation. Injunction against erection of wharf); Shivery v. Streeper, 24 Fla. 103, 3 So. 865 (livery stable adjoining hotel); Thebaut v. Canova, 11 Fla. 143 (erection of steam mill); Butler v. Mayor, etc., of Thomasville, 74 Ga. 570 (laying sewer); Deaconess Home & Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748, L. R. A. 215, aff'g 104 Ill. App. 484 (hospital); Flood v. Consumers Co., 105 Ill. App. 559, 564, per Burke, J. (building for storage of ice, prayer for injunction denied, citing Lake View v. Letz, 44 Ill. 81); Duncan v. Hayes, 22 N. J. Eq. 25; People v. Condon, 102 Ill. App. 449 (to restrain gambling, pool selling, etc.); Wahle v. Reinbach, 76 Ill. 322, 326 (against construction of privy, quoting Wood on Nuisances, p. 817, § 770); Pence v. Garrison, 93 Ind. 345; Smith v. Fitzgerald, 24 Ind. 316 (flow of impure water from brewery. Injunction may issue, under statute, during litigation to prevent great injury); Laughlin v. Lamasco City, 6 Ind. 223 (wharf, relief not allowed where compensation in damages); Bushnell v. Robeson, 62 Iowa, 540, 17 N. W. 888 (slaughter house, Miller's Code, §§ 3331, 3386); Hahn & Harris v. Thornbury, 7 Bush. (70 Ky.) 403; Dumesnil v. Dupont, 18 B. Mon. (57 Ky.), 800, 68 Am. Dec. 750 (erection of powder house); Gates v. Blincoe, 2 Dana (Ky.), 158, 26 Am. Dec. 440; Board of Health v. Cotton Mills, 46 La. Ann. 806, 15 So. 164 (under proper limitations and restrictions injunction may issue in case of a nuisance *per se*); Sterling v. Littlefield, 97 Me. 479, 54 Atl. 1108; Tracy v. LeBlanc. 89 Me. 304; Varney v. Pape, 60 Me. 192; Reese v. Wright, 98 Md. 272, 56 Atl. 976; Cadigan v. Brown, 120 Mass. 493 (Gen'l Stat. c. 113, § 2, cl. 9); Dana v. Valentine, 5 Metc. (46 Mass.) 8; Boston Water Power Co. v. Boston & W. R. Corp., 16 Pick. (33 Mass.) 512 (dam); Bemis v. Uphano, 13 Pick. (30 Mass.) 169 (Stat. 1828, c. 137, § 6); Proprietors of Charles River Bridge v. Proprietors of Warren Bridge, 6 Pick. (23 Mass.) 376 (Stat. 1827, c. 88); Wilmarth v. Woodcock, 58 Mich. 482, 25 N. W. 475 (projecting cornice); Learned v. Hunt, 63 Miss. 373; Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378; Gwin v. Melmoth, 1 Freem. Ch. (Miss.) 505; Rice v. Jefferson, 50 Mo. App. 464; Cheeseman v. Hale (Mont., 1905), 79 Pac. 254 (action for both legal and equitable relief and question of right of trial by jury); Burnham v. Kempton, 44 N. H. 78; Dover v. Portsmouth Bridge, 17 N. H. 200; Beach v. Sterling Iron & Z. Co., 54 N. J. Eq. (9 Dick.) 65, 33 Atl. 286 (discoloration of water to injury of manufacturer of white tissue paper); Raritan v. Port Reading R. Co., 49 N. J. Eq. 11, 23 Atl. 127; Newark Aqueduct Board v. City of Passaic, 45 N. J. Eq. 393, 18 Atl. 106. Aff'd 46 N. J. Eq. 552, 20 Atl. 54; Carlisle v. Cooper, 21 N. J. Eq. 576; Babcock v. New Jersey Stockyard Co., 20 N. J. Eq. 296; Holsman v. Boiling Spring Bleaching Co., 14 N. J. Eq. 335; Jersey City Water Comms. v. City of Hudson, 13 N. J. Eq. 420; Zabriskie v. Jersey & B. R. Co., 13 N.

ing the exercise or erection of, and in some instances to abate, that from which irreparable injury to individuals or great public in-

J. Eq. 314; Wolcott v. Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790; Davidson v. Isham, 9 N. J. Eq. 186; Tichenor v. Wilson, 8 N. J. Eq. 197; Vanwinkle v. Curtis, 3 N. J. Eq. 422; Robeson v. Pettinger, 2 N. J. Eq. 57, 32 Am. Dec. 412; Martin v. City of New York, 77 N. Y. Supp. 1013 (depositing garbage. Injunction *pendente lite*); Shulz v. Albany, 59 N. Y. Supp. 235, 42 App. Div. 437 (sewer); Morgan v. Binghamton, 102 N. Y. 500, 7 N. E. 424, 3 Cent. Rep. 648 (sewers); Abendroth v. Manhattan R. Co., 7 N. Y. St. Rep. 43; Davis v. Lambertson, 56 Barb. (N. Y.) 480; Knox v. City of New York, 55 Barb. (N. Y.) 404, 38 How. Prac. 67; Gilbert v. Mickle, 4 Sandf. Ch. (N. Y.) 357 (libelous placard); City of Rochester v. Curtis, Clark Ch. (N. Y.) 336; Van Bergen v. Van Bergen, 3 Johns. Ch. (N. Y.) 282; Attorney-General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371; Reyburn v. Sawyer, 135 N. C. 328, 65 L. R. A. 930, 47 S. E. 761; Vickers v. City of Durham, 132 N. C. 880, 44 S. E. 685 (sewage discharged on premises); Ellison v. Town of Washington Com'rs, 58 N. C. 57, 75 Am. Dec. 430; Simpson v. Justice, 43 N. C. 115; Bradsher v. Lea's Heirs, 38 N. C. 301; Barnes v. Calhoun, 37 N. C. 199; Citizens of Raleigh v. Hunter, 16 N. C. 12; Attorney-General v. Blount, 11 N. C. 384, 15 Am. Dec. 526; McCord & Hunt v. Iker, 12 Ohio, 287; McClung v. North Bend & C. Co. (Ohio), 31 Ohio L. J. 9; West v. Ponca City Milling Co., 14 Okla. 646, 79 Pac. 100; Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 Atl. 1065 (blast furnaces); Mirkil v. Morgan, 134 Pa. 144, 25 W. N. C. 532, 16 Atl. 628, 47 Phila. Leg. Int. 308; Mowday v. Moore, 133 Pa. 598, 47 Phila. Leg. Int. 290, 25 W. N. C. 529, 19 Atl. 626, 20 Pitts. L. J. N. S. 469; Appeal of Richards, 57 Pa. 105, 98 Am. Dec. 202; Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221; Scott v. Houpt (Pa.), 8 Kulp. 42; Humphrey v. Irvin, 3 Pa. Cas. 272, 6 Atl. 479 (action on case for damages, Act May 2, 1876, P. L. 95. Multiplicity of suits); Dallas v. Ladies' Decorative Art Club of Phila. 4 Pa. Co. Ct. 340; Campbell v. Schofield (Pa.), 29 Leg. Int. 325; Hough v. Dotlestown, 4 Brewst. (Pa.) 333; Grey v. Ohio & P. R. Co., 1 Grant Cas. (Pa.) 412; Commissioners of Moyamensing v. Long, 1 Pars. Eq. Cas. (Pa.) 143; Biddle v. Ash, 2 Ashm. (Pa.) 211; State v. City Council of Charleston, 11 Rich. Eq. (S. C.) 432; Ducktown Sulphur, Copper & Iron Co. v. Fain, 109 Tenn. (1 Cates) 56, 70 S. W. 813 (sulphur works); Lassater v. Garrett 4 Baxt. (63 Tenn.) 368 (Code § 3403); Wall v. Cloud, 3 Humph. (22 Tenn.) 181; Vaughn v. Law, 1 Humph. (20 Tenn.) 123; State v. Patterson, 14 Tex. Civ. App. 465, 44 Cent. L. J. 162, 37 S. W. 478; Thornton v. Grant, 10 R. I. 477, 14 Am. Rep. 701 (wharf); Wingfield v. Crunshaw, 4 Hen. & M. (Va.) 474; Ingersoll v. Rosseau, 35 Wash. 92 76 Pac. 513; Powell v. Bentley & G.

jury will ensue, and in the case of a public nuisance this rule applies independent of the concurrent jurisdiction to remedy by indictment. Equity will also interfere to prevent irreparable injury before a court of law can act definitely; to avoid protracted and expensive litigation or where the fact of nuisance is placed beyond a doubt.[4] If the injury complained of is the threatened doing by a party upon his own land of an act which would result through gravitation in a continuous or constantly recurring injury to the plaintiff's land amounting to a nuisance, and full compensation for the entire injury which would be thus inflicted can not be obtained in an action at law, a court of equity will afford relief by injunction. This rule applies to prevent the construction of a drain or channel into which to turn waters of a large stream, which would overtax the capacity of another drain or channel and so submerge and injure the lands drained by the latter.[5] And where there is an injury by fouling the waters of a creek by permitting sewage to flow therein at intervals in substantial quantity so that the water is polluted and rendered unfit for use and at times offensive to the senses but not injurious to health, yet it is a partial obstruction to the free use and enjoyment by plaintiff of her land, and it would be difficult to compute the damage, and an injunction is necessary to prevent a multiplicity of actions, such facts warrant the award of a perpetual injunction.[6] So, where plaintiff owns valuable and extensive machinery, which gives employment to a large number of hands and which is worked by the water power

Furniture Co., 34 W. Va. 804, 12 L. R. A. 53, 12 S. E. 1085, 43 Alb. L. J. 433; Medford v. Levy, 2 L. R. A. 363, 31 W. Va. 649, 8 S. E. 302; Pennsylvania v. Wheeling Bridge Co., 13 How. (U. S.) 518; Parker v. Winnipiseogie Lake Cotton & Woolen Mfg. Co., Fed. Cas. No. 10,752 (1 Cliff. 274), aff'd (1862) 67 U. S. (2 Black.) 545, 17 L. Ed. 333; Jordeson v. Sutton (C. A.), 68 L. J. Ch. N. S. 666 (1898), 2 Ch. 614. Examine International & G. N. R. Co. v. Davis (Tex. Civ. App.), 29 S. W. 483.

3. Wees v. Coal & Iron R. Co., 54 W. Va. 421, 46 S. E. 166 (obstruction of public highway by railroad a case of balancing public and private injuries); Powell v. Bentley & G. Furniture Co., 34 W. Va. 804, 12 S. E. 1085, 12 L. R. A. 53, 43 Alb. L. J. 433 (a factory). See Clifton v. Town of Weston, 54 W. Va. 250, 46 S. E. 360.

4. State v. City of Mobile, 5 Port. (Ala.) 279, 30 Am. Dec. 564.

5. Pence v. Garrison, 93 Ind. 345.

6. Peterson v. Santa Rosa, 119 Cal. 387, 51 Pac. 557.

of a stream, a court of equity will restrain by injunction a repeated diversion of the water and a threatened continuance of such diversion by the upper proprietors by means of a ditch on their own lands; and this on the principle of preventing an irreparable mischief and a multiplicity of suits.[7] Again, although formerly doubted, it has become a settled principle that chancery will sustain a bill filed by an individual, to enjoin a nuisance, which is public in its character; but it is held that such transcendent power of the court will be exercised sparingly and where the exercise of such power is desired by a party it must be satisfactorly shown that irreparable injury will be inflicted incapable of being adequately compensated in damages or which threatens materially to impair the comfort of the existence of those living near it, a strong and mischievous case of pressing necessity must exist.[8] So the functions of a writ of injunction in behalf of the public should only be exercised on the ground of preventing irreparable injury, interminable litigation and the protection of a public right; and their exercise is subject to the same perils and liabilities as an individual if the thing abated is not in fact a nuisance.[9] But a nuisance will be enjoined where the evidence is clear and certain and the nuisance not only destroys the peace, quiet and comfort of those living in the residence of the injured party, but likewise seriously and injuriously affects their health and occasions irreparable injury within the meaning of the law.[10] Ordinarily an injunction will also be granted when the act or thing granted is a nuisance *per se,* or necessarily will be a nuisance, and it will be denied when it may or may not be a nuisance according to circumstances, or when the injury apprehended is doubtful or contingent.[11] The jurisdiction of courts of equity over the subject-matter is, however, not an original jurisdiction. This power was formerly exercised very sparingly, only in extreme cases, at least not until after the right and question of nuisance had been first

7. Wright v. Moore, 38 Ala. 593, 82 Am. Dec. 731.

8. Rosser v. Randolph, 7 Port. (Ala.) 238, 31 Am. Dec. 712 (erection of a mill).

9. Board of Health v. Cotton Mills, 46 La. Ann. 806, 15 So. 164.

10. Deaconess Home & Hospital v. Bontjes, 207 Ill. 553, 64 L. R. A. 215, aff'g 104 Ill. App. 484 (hospital).

11. Flood v. Consumers' Co., 105 Ill. App. 559, 564, per Burt, J., citing Lakeview v. Letz, 44 Ill. 81; Duncan v. Hayes, 22 N. J. Eq. 25.

settled at law. While in modern times the strictness of this rule has been somewhat relaxed, there is still a substantial agreement among the authorities that to entitle a party to equitable relief before resorting to a court of equity his case must be free and clear from all substantial doubt as to his right to relief. To enable him to come into a court of equity in the first instance there must be a strong and mischievous case of pressing necessity.[12] Again, injunctions are not awarded by courts of equity for the infringement of doubtful rights, until they have been established at law. But when the right is clear and the injury is irreparable, an injunction will be awarded, although the right has not been established at law.[13] But equity will not, it is held, interfere where the damages are of a trifling and merely nominal character, and if damages given in a suit at law are too small to carry costs it constitutes no ground for equitable interference.[14] Nor will equity order abatement of a nuisance where the right is doubtful. The court has no power to deal with the manner in which the proprietor of a business shall arrange a part of his shop so as to lessen a noise where he is not amenable to the court by the character of the case against him, as in case the nuisance is not established.[15] And it is no part of the court's duty, where the plaintiff has proved his right to an injunction against a nuisance, to inquire in what way defendant can best remove it. The plaintiff, unless removal of injury is physically impossible, is at once entitled to an injunction, and it is defendant's duty to find his own way out of the difficulty, whatever may be the inconvenience or expense to which he may thereby be subjected.[16]

12. Flood v. Consumers' Co., 105 Ill. App. 559, 564, per Burke, J. (building for storage of ice. Prayer for injunction denied).

13. Citizens of Raleigh v. Hunter, 16 N. C. (1 Dev. Eq.) 12.

14. McCord & Hunt, v. Iker, 12 Ohio, 387.

15. Scott v. Houpt, 8 Kulp. (Pa.) 42.

16. Attorney-Gen'l v. Colney Hatch Lunatic Asylum, L. R. 4 Ch. 146, 38 L. J. Ch. 265, 17 W. R. 240, 19 L. T. 708.

Order or judgment for abatement of nuisance, when proper and when not. See Ashbrook v. Commonwealth, 1 Bush (Ky.), 139, 89 Am. Dec. 616 (indictment and verdict); State v. Haines, 17 Shep. (30 Me.) 65 (conviction); Lansborn v. Covington, 2 Md. Ch. 409 (private nuisance); Shepard v. People, 40 Mich. 487 (information; order for destruc-

§ 417. **Whether establishment at law of right a prerequisite to equitable relief.**—In determining this question the essentials of equitable jurisdiction judgment, decree or relief, elsewhere stated,[17] are most important and controlling factors, at least they

tion of dam not justified except etc.); Crippen v. People, 8 Mich. 117 (time when power of removal on conviction must be exercised); State v. Noyes, 10 Fost. (N. H.) 279 (indictment, under what allegations only judgment to abate will be ordered); Taylor v. People, 6 Park. Cr. R. (N. Y.) 347 (noxious trade); requisite averments for judgment on conviction); Munson v. People, 5 Park. Cr. R. (N. Y.) 16 (requisite allegations on indictment for abatement as distinguished from personal judgment); Mazza v. Hester, 1 Wkly. C. Bull. 375, 5 Ohio Dec. 430 (judgment against tenant for obstruction to right of way, when erroneous); State v. Paggett, 8 Wash. 579, 36 Pac. 487 (order for abatement not valid on employees conviction. Wash. Gen. Stat. § 2895; Wash. Pen. Code, § 118). See, further, as to decree, judgment or order and form thereof the following cases: People, Lind v. San Luis Obispo, 116 Cal. 617, 48 Pac. 723 (enjoining public nuisance, extent of order); McMenomy v. Baud, 87 Cal. 134, 26 Pac. 795 (when injunction need not abate entirely but may be limited); Sullivan v. Royer, 72 Cal. 248, 1 Am. St. Rep. 51, 13 Pac. 655 (relief granted in accordance with facts though not prayed for); People v. Gold Ditch & Mining Co., 66 Cal. 155, 4 Pac. 1150 (form of perpetual injunction, what need not be stated); Morgan v. Danbury, 67 Conn. 484, 35 Atl. 499 (judgment against deposit of sewage held not too broad in view of averments); Williamson v. Yungling, 93 Ind. 42 (abatement may be ordered); Maxwell v. Boyne, 36 Ind. 120 (conviction; where order of abatement is proper); Cromwell v. Lawe, 14 Ind. 234 (damages; order for abatement not as of course); Platt v. Chicago, B. & Q. R. Co., 74 Iowa, 127, 37 N. W. 107 (order for abatement proper or verdict for damages); Richards v. Holt, 61 Iowa, 529, 16 N. W. 595 (injunction limited to use constituting nuisance); Fuller v. Chicago, R. T. & P. Ry. Co., 61 Iowa, 125, 51 N. W. 861 (when order of removal not warranted); Bollinger v. Com., 98 Ky. 574, 17 Ky. L. Rep. 1122, 35 S. W. 553 (time of making order after overruling motion for new trial); Bannon v. Rohmeiser, 10 Ky. L. Rep. 395, 9 S. W. 293 (removal of building); Koehl v. Schoenhausen, 47 La. Ann. 1316, 17 So. 809 (how writ of injunction enforced by penalty; (State v. Beal, 94 Me. 520, 48 Atl. 124 (when alleged nuisance is only in part; abatement); Brightman v. Inhabitants of Bristol, 65 Me. 426, 20 Am. Rep. 711 (when nuisance consists in use to which building is put and not in its location, abatement must consist only in stopping such use); Berkshire Woolen Co. v. Day, 12 Cush. (Mass.) 128 (abatement of part); Bemis v. Clark, 11 Pick. (Mass.) 452 (construction of statute as to issue of warrant to abate. Act 1828, c. 137, § 6); Shepard v. People, 40 Mich. 487 (order to destroy when not necessary); Colstrum v. Minne-

have controlled a large number of the decisions upon this point; but subject to certain exceptions the tendency of modern authori-

apolis St. Ry. Co., 33 Minn. 516, 24 N. W. 225 (injunction or abatement or damages under Gen. Stat. 1878, c. 75, p. 44); Grant v. Schmidt, 22 Minn. 1 (separate judgment when not allowed in joint action); Learned v. Hunt, 63 Miss. 373 (uncertainty in decree); Chenango Bridge Co. v. Paige, 83 N. Y. 178, 38 Am. Rep. 407 (enjoining use and not destruction, when proper); Wilmot v. Bell, 78 N. Y. S. 591, 76 App. Div. 252 (perpetual injunction not proper under Code Civ. Proc. c. 14, tit. 1, art. 7, §§ 1660-1663, judgment may award damages or direct removal of nuisance, or both); Rosenheimer v. Standard Gaslight Co., 39 App. Div. 482, 57 N. Y. Supp. 330 (relief by way of injunction if justified by facts instead of compensation); People v. Metropolitan Tel. & Teleg. Co., 11 Abb. N. C. 304, 64 How. Prac. 120 (abatement, damages and equitable relief); Fleischner v. Citizens Real Estate & Invest. Co., 25 Or. 119, 35 Pac. 174 (equity may award relief and damages even though Code provides for damages at law); Kothenberthal v. City of Salem Co., 13 Or. 604 (warrant for abatement need not necessarily be awarded after verdict as it may be inadequate); Ankeny v. Fairview Milling Co., 10 Oreg. 390 (warrant may identify nuisance); Barclay v. Commonwealth, 25 Pa. 503, 64 Am. Dec. 715 (order to sheriff to abate, when erroneous); City of Ennis v. Gilder, Tex. Civ. App. 74 S. W. 585 (sufficiency of decree as to city dam and reservoir); Price v. Oakfield Highland Creamery Co., 87 Wis. 536, 24 L. R. A. 58 N. W. 1039 (damages for past injuries awarded in equity).

Liquor nuisance—Decree, judgment and order.—Form, requisites and enforcements of, and statutes. See the following cases: Kissel v. Lewis, 156 Ind. 233, 59 N. E. 478; State v. Dominisse (Iowa), 99 N. W. 561; Dosh v. U. S. Exp. Co. (Iowa), 99 N. W. 298; Morris v. Lowry, 113 Iowa, 544, 85 N. W. 788; State v. Gifford, 111 Iowa, 648, 82 N. W. 1034; State v. Bowman (Iowa), 82 N. W. 493; McCoy v. Clark, 109 Iowa, 464, 80 N. W. 538; Merrifield v. Swift, 103 Iowa, 167, 72 N. W. 444; Silvers v. Travers, 82 Iowa, 52, 11 L. R. A. 804, 47 N. W. 888; Sweeny v. Traverse, 82 Iowa, 720, 47 N. W. 889; State v. Adams, 81 Iowa, 593, 47 N. W. 770; State v. Estep, 66 Kan. 416, 71 Pac. 857; State, Violett v. King, 46 La. Ann. 78, 14 So. 423; Davis v. Auld, 96 Me. 559, 53 Atl. 118; Carleton v. Rugg, 149 Mass. 550, 5 L. R. A. 193, 22 N. E. 55; State v. Piper (N. H.), 47 Atl. 703; State v. Harrington, 69 N. H. 496, 45 Atl. 404; State v. McMaster (N. D.), 99 N. W. 58; State v. Massey, 72 Vt. 210, 47 Atl. 834; State v. Clark, 62 Vt. 278, 19 Atl. 981. See, also, §§ 399-401, herein.

Judgment that nuisance be abated can only be rendered where it appears that the nuisance is continued to the finding of the indictment. State v. Noyes, 30 N. H. 279; State v. Hull, 21 Me. 84; King v. Stead, 8 Durnf. & E. 142.

ties is contrary to so much of the former rule as required the establishment of the legal right as a prerequisite to relief by injunction,[18] for the courts have not refused equitable relief in certain cases, amongst others, which are of pressing necessity, of immediate, imminent actual danger, or of irreparable injury, even though the right had not been established at law in the first instance.[19]

Enforcing judgment of abatement. In a Georgia case certain complainants obtained a decree against the defendants, by which the latter were authorized to raise their mill-dam to a certain height, and it was provided that the defendants should clear their pond of all timber. They were allowed six months from the rendition of the decree so to do, and if they failed to clear the pond of timber within that time, it was to be abated as a nuisance. After the expiration of the time allowed, complainants filed an affidavit with the clerk of the Superior Court, stating that defendants had failed to clear their pond; and thereupon the clerk issued a process directed to the sheriff, commanding him to pull down defendants' dam and abate the same as a nuisance. To this process defendants filed an affidavit of illegality. The jury found in favor of the illegality, and the judge quashed the process. It was held that the clerk had no power to issue such process, and whatever errors may have been committed on the trial of the issue, the quashing of the process was right, and a new trial would not be granted. Wall v. Woolbridge, 71 Ga. 256. See, further, as to enforcement of decree judgment or order, Ames v. Cannon River Mfg. Co., 27 Minn. 245, 6 N. W. 787, Genl. Stat. 1878, c. 75 (action to abate); Commonwealth v. Bredin, 165 Pa. 224, 26 Pitts. L. J. N. S. 29, 30 Atl. 921 (sentence against officers of borough and subsequent expiration of office); Commonwealth v. McLaughlin, 120 Pa. 518, 14 Atl. 377, 21 W. N. C. 478, 13 Cent. Rep. 228; Barclay v. Commonwealth, 25 Pa. 503, 64 Am. Dec. 715; Coffer v. Territory, 1 Wash. 325, 11 L. R. A. 296, 25 Pac. 632 (conviction; house of ill-fame).

17. See § 415, herein.

18. Mowday v. Moore, 133 Pa. 598, 611, 19 Atl. 626, 25 Wkly. N. C. 529. See Tracy v. Le Blanc, 89 Me. 304, 36 Atl. 399; Durant v. Williamson, 7 N. J. Eq. 547; Weber v. Miller (C. C.), 1 Ohio Dec. 520.

19. **When not a prerequisite to equitable relief to establish right at law.** See Ogletree v. McQuaggs, 67 Ala. 580, 42 Am. Rep. 112; Hundley v. Harrison, 123 Ala. 292, 26 So. 294; City of Kewanee v. Otley, 204 Ill. 402, 411, 68 N. E. 388; Dwight v. Hayes, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367, aff'g 49 Ill. App. 530; Dierks v. Addison Twp. Highway Comrs., 142 Ill. 197, 31 N. E. 496; Deaconess Home & Hospital v. Bontjes, 104 Ill. App. 484, aff'd 207 Ill. 553, 69 N. E. 748; Iliff v. School Directors, 45 Ill. App. 419; Sterling v. Littlefield, 97 Me. 479, 54 Atl. 1108; Davis v. Auld, 96 Me.

§ 418. **Same subject—Early rulings and instances.**—It is said in an early case that where a thing already exists which is alleged to be a nuisance, it may be a question whether the court will interfere by injunction, before a trial at law establishing the fact of nuisance; but where the object of the one is to prevent the erection of that which will be productive of injury serious and irreparable, if erected, the court will pass upon the question, and interpose its

559, 53 Atl. 118; Robinson v. Baugh, 31 Mich. 290; White v. Forbes, Walk. Ch. (Mich.) 112; Learned v. Hunt, 63 Miss. 373; Harrelson v. Kansas City & A. R. Co., 151 Mo. 482, 52 S. W. 368; Whipple v. McIntyre, 69 Mo. App. 397; Stanford v. Lyon, 37 N. J. Eq. 94 (examine Carlisle v. Cooper, 21 N. J. Eq. 576); Beach v. City of Elmira, 22 Hun, 158; Gardner v. Newburgh, 2 Johns. Ch. 162, 7 Am. Dec. 526; Appeal of Hacke, 101 Pa. 245; Shaw v. Queen City Forging Co., 7 Ohio N. P. 254, 10 Ohio S. & C. P. Dec. 107; Barkan v. Knecht (C. P.), 10 Wkly. Law Bull. 342; Smith v. Cummings, 2 Pars. Eq. Cas. (Pa.) 92; Spooner v. McConnell, 1 McLean (U. S. C. C.), 337; Fed. Cas. No. 13,245.

When a prerequisite to equitable relief to establish right at law, see St. James Church v. Arrington, 36 Ala. 546, 76 Am. Dec. 332; State v. City of Mobile, 5 Port. (Ala.) 279, 30 Am. Dec. 564 (preliminary injunction); Flood v. Consumers' Co., 105 Ill. App. 559; Canal Melting Co. v. Columbia Park Co., 99 Ill. App. 215; Town of Lakeview v. Letz, 44 Ill. 81; Dunning v. City of Aurora, 40 Ill. 481; Sterling v. Littlefield, 97 Me. 479, 54 Atl. 1108, 86 Mo. 55, 29 Atl. 935; Varney v. Pope, 60 Me. 192; Porter v. Witham, 5 Shep. (17 Me.) 292; Ingraham v. Dunnell, 5 Metc. (46 Mass.) 118; Dana v. Valentine, 5 Metc. (46 Mass.) 8; Gwin v. Melmoth, 1 Freem. Ch. (Mis.) 505; Eastman v. Amoskeag Mfg. Co., 47 N. H. 71; Burnham v. Kempton, 44 N. H. 78; Attorney-General v. Stewart, 20 N. J. Eq. 415; Attorney-General v. Heishon, 18 N. J. Eq. 410; Hodgkinson v. Long Island R. Co., 4 Edw. Ch. (N. Y.) 411; Mohawk Bridge Co. v. Utica & S. R. Co., 6 Paige (N. Y.), 554; Redd v. Edna Cotton Mills, 136 N. C. 342, 67 L. R. A. 983, 48 S. E. 761; Frizzle v. Patrick, 59 N. C. 354; Simpson v. Justice, 43 N. C. 115; McCord & Hunt v. Iker, 12 Ohio, 387; Foster v. Norton, 2 Ohio Dec. 390; New Castle (McClain) v. Raney, 130 Pa. 546, 6 L. R. A. 737, 20 Pitts L. J. N. S. 345, 47 Phil. Leg. Int. 415, 25 W. N. C. 246, 27 Am. & Eng. Corp. Cas. 566, 18 Atl. 1066; Rhea v. Forsyth, 37 Pa. 503, 78 Am. Dec. 441; Bell v. Ohio & P. R. Co., 25 Pa. 161, 64 Am. Dec. 687, 1 Grant Cas. 105, 2 Pitts. Leg. Int. 42; Grey v. Ohio & P. R. Co., 1 Grant Cas. 412; Union Water Co. v. Enterprise Oil Co. (Pa. C. P.), 21 Pitts. L. J. N. S. 159; Kennerty v. Etiwan Phosphate Co., 17 S. C. 411, 43 Am. Rep. 607; Kerkman v. Handy, 11 Humph. (30 Tenn.) 406, 54 Am. Dec. 45; Caldwell v. Knott, 10 Yerg. (18 Tenn.) 209.

authority to avert the threatened injury, for the matter cannot be tried at law, and should the court refuse its aid, there would be no remedy.[20] So in an English case defendant had a soap and black-ash manufactory and information was filed in the name of the attorney-general by the neighbors. A motion to suspend this alleged nuisance until a trial at law was refused, and Lord Eldon observed, as to what amounts to a nuisance, that some manufactories have been held no nuisance though they may destroy the whole comfort of life, as a sugar house, or a brew house, or making of bricks, which are so in common parlance only, and that the court is very cautious in granting injunctions in such cases *ex parte*, but that the court will abate a nuisance in a public highway or in a harbor.[21] But it is declared in a New York case that courts of equity have concurrent jurisdiction with courts of law in cases of private nuisance, and it is not every case of nuisance which will authorize the exercise of the jurisdiction. It rests upon the principle of clear and undoubted right to the enjoyment of the subject in question, and will only be exercised in case of strong and imperious necessity, or where the rights of the parties have been established at law in order that the mandate of the court may be certain.[22] And, where a mill was erected in 1866, and used in the ordinary manner since, until 1871, and a bill was filed to enjoin the mill owner from allowing the ebb and flow of the water below the mill, caused by the usual stopping and opening of the gate, on the ground that it produced sickness in the neighborhood, with special damage to the plaintiff, and it appeared by affidavits that there was much conflict of testimony, as to the fact of the damage and as to the ebb and flow being the cause of the sickness, it was held no abuse of the discretion of the court if he refuse the injunction until the facts were passed upon by a jury.[23] Again, it is decided that after the fact that the acts complained of are a nuisance is established, by a verdict of the jury, equity will inter-

20. Bell v. Blount, 2 N. C. (4 Hawks) 384.

21. Attorney-Genl. v. Cleaver, 18 Ves. 211.

22. Fisk v. Wilber, 7 Barb. (N. Y.) 395.

23. Nelms v. Clark & Morgan, 44 Ga. 617.

24. Crawford v. Atglen Axle & Iron Mfg. Co. (Pa.), 1 Chest. Co. Rep. 412.

fere to prevent their continuance, for the first recourse must be had to an action at law to determine the existence of the nuisance before equity will interfere to restrain it.[24]

§ 419. **Prospective or threatened nuisance—Apprehended injury.**[25]—Equity will not afford relief against a merely prospective or threatened nuisance, where the injury is apprehended, doubtful, possible or contingent. A mere prospect of future annoyance or damage is insufficient. But, even though the nuisance is not one *per se*, the court will intervene where there is an apparent, real, imminent, and immediate danger, and the case is one of great and pressing necessity, where the apprehension is well grounded and clearly aappears; that is, where a strong case is made out, and the threatened injury is material and one that is certain and inevitable, and the mischief irreparable and the legal remdy inadequate.[26]

25. See § 415, herein.

26. State of Missouri v. State of Illinois, 180 U. S. 208, 45 L. Ed. 497, 21 S. Ct. 331 (sewage); Ramsay v. Riddle, 1 Cranch. (U. S. C. C.) 399, Fed. Cas. No. 11,544 (will not); Thebaut v. Canova, 11 Fla. 143 (will not); Bacon v. Walker, 77 Ga. 336 (will not—jail); Harrison v. Brooks, 20 Ga. 537 (will not—unless, etc.); Flood v. Consumers' Co., 105 Ill. App. 559 (will not—except, etc. Building); Thornton v. Roll, 118 Ill. 350, 8 N. E. 145 (will not); Dalton v. Cleveland, C. C. & St. L. R. Co., 144 Ind. 121, 43 N. E. 130 (will not—intended use of building); Hutchinson v. Delano, 46 Kan. 345, 26 Pac. 740; Marrs v. Fiddler, 24 Ky. Law Rep. 722, 69 S. W. 953 (will not—except, etc. Building); Davis v. Adkins 18 Ky. L. Rep. 73, 35 S. W. 271; Pfingst v. Senn, 15 Ky. L. Rep. 325, 7 Nat. Corp. Rep. 390, 21 L. R. A. 569, 2[illegible] S. W. 358 (will not—prospective use of premises as beer garden, etc.); Gallagher v. Flury, 99 Md. 181, 57 Atl. 672 (will not—except, etc.); Charles River Bridge Co. v. Warren Bridge Co., 6 Pick. (23 Mass.) 376 (will—bridge); St. Johns v. McFarlan, 33 Mich. 72, 20 Am. Rep. 671 (will not); Gwin v. Melmoth, 1 Freem. Ch. (Miss.) 505 (will not—structure); Van de Vere v. Kansas City, 107 Mo. 83, 35 Am. & Eng. Corp. Cas. 101, 17 S. W. 695 (will not—fire engine house); Holke v. Herman, 87 Mo. App. 125 (will under certain conditions); Newark Aqueduct Board v. Passaic, 46 N. J. Eq. 552, 20 Atl. 54, 22 Atl. 55, 13 N. J. L. J. 238 (will not—sewage); Newark Aqueduct Board v. Passaic, 45 N. J. Eq. 393, 18 Atl. 106; 46 N. J. Eq. 552 (when granted); Duncan v. Hayes, 22 N. J. Eq. 25 (will not—except, etc.); Attorney-General v. Steward, 21 N. J. Eq. 340 (will—building); Attorney-General v. Steward, 20 N.

§ 420. Same subject—Other statements or forms of rule.—The general rule is that the court will not interfere in a case of merely prospective injury. The nuisance must be actual and existing, and not future, however strongly the apprehension of injury may be supported by scientific evidence.[27] So plaintiff must show that the acts which he seeks to restrain will be a nuisance, that the injury to him will be real and the damages irreparable, and that his apprehension was based on imminent danger.[28] And exciting, constant and reasonable apprehension of danger, although no actual injury has been occasioned, has been held to be a nuisance, as in the case of keeping gun powder.[29] It is also declared that there are cases, where acts done by another on his own land may constitute a nuisance to a dwelling house when they excite the constant and reasonable apprehension of injury. But in all these cases, it is held that the danger must be actual and imminent, and not imaginary, conjectural or remote.[30] Again, when a

J. Eq. 415 (will not—building); Cleveland v. Citizens Gaslight Co., 20 N. J. Eq. 201 (will under certain circumstances); Wolcott v. Melick, 11 N. J. Eq. 204, 66 Am. Dec. 790 (will in certain cases); Butler v. Rogers, 9 N. J. Eq. 187 or 487 (will not); Thompson v. City of Patterson, 9 N. J. Eq. 624 (use of property or structures); State Courter v. Newark Board of Health, 54 N. J. L. 325, 23 Atl. 949, 37 Am. & Eng. Corp. Cas. 508, 14 Crim. L. Mag. 508 (will not); Mohawk Bridge Co. v. Utica & S. R. Co., 6 Paige (N. Y.), 554 (will be granted); Depierris v. Mattern, 10 N. Y. Supp. 636 (will not—intended use of premises); Vickers v. City of Durham, 132 N. C. 880, 44 S. E. 685 (will not—sewage); Dorsey v. Allen, 85 N. C. 358, 39 Am. Rep. 704 (will not); Esser v. Wattier, 25 Or. 7, 34 Pac. 756 (will not—dam); Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221 (will not); Carpenter v. Cummings, 2 Phila. 74; Biddle v. Ash, 2 Ashm. (Pa.) 211 (will); Honesdale v. Weaver, 2 Pa. Dist. R. 344 (will—wooden building, see §§ 341-344, herein); Pierce v. Gibson County, 107 Tenn. 224, 233, 64 S. W. 33, 55 L. R. A. 477, 89 Am. St. Rep. 946 (will—sewage); Cheatham v. Shearon, 1 Swan (Tenn.), 213, 55 Am. Dec. 734 (will); Pope v. Bridgewater Gas Co., 52 W. Va. 252, 43 S. E. 87 (what must be shown); Chambers v. Cramer, 49 W. Va. 395, 38 S. E. 691 (insufficient and sufficient grounds for); Attorney-General v. Manchester (1893), 2 Ch. 87 (will not—unless, etc.).

27. Att'y-General v. Kingston-on-Thames Corporation, 13 W. R. 888, 11 Jur. N. S. 596, 12 L. T. 665, 34 L. J. Ch. 481.

28. Vickers v. City of Durham, 132 N. C. 880, 44 S. E. 685.

29. Barnes v. Hathorn, 54 Me. 124, 127, 128, per Kent, J.

30. Barnes v. Hathorn, 54 Me. 124,

municipal corporation is proceeding to lay sewers and discharge filthy sewage upon the land of the property owner, which may probably cause injury to his health and sickness in his family, and where the nuisance is continuing and likely to be permanent, and the consequences are not barely possible, but to a reasonable degree certain, a court of equity may interfere to arrest such nuisance before it is completed.[31]

133, per Dickson, J., in dissenting opinion.

31. Butler v. The Mayor of Thomasville, 74 Ga. 570.

SUBDIVISION II.

PARTIES ENTITLED TO REMEDY—LIABILITY.

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471. Same subject—Instances.
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473. Immoral, illegal and unlawful use of property—Who liable.
474. Liability of persons jointly and severally contributing.
475. Other persons who are and are not liable.

§ 421. **Who entitled to remedy—Against whom remedy lies—Preliminary statement.**—The general principles which govern in determining who is entitled to a remedy, and against whom a remedy lies or who is liable, are so fully stated throughout this work, especially in the earlier chapters, that they will not be repeated here, and only certain rules, and decisions or instances, in particular cases will be considered under this chapter.

§ 422. **Private person suffering special injury may sue—Public nuisance.**—Where a private party has been specially damaged by a public nuisance, his damage differing in kind and degree from

that of the general public, he may maintain an action to abate such nuisance.[1]

1. Dawson v. McMillan, 34 Wash. 269, 75 Pac. 807 ("a private person may maintain a civil action for a public nuisance if it is specially injurious to himself but not otherwise"). Ballinger's Annot. Codes & Stat., Wash. 1897, § 3093.

Private person may bring action. Northern P. R. Co. v. Whalen, 149 U. S. 157, 13 Sup. Ct. 822, 37 L. Ed. 686; Mississippi & M. R. Co. v. Ward, 2 Black (67 U. S.), 485, 17 L. Ed. 311; Pennsylvania v. Wheeling Bridge Co., 13 How. (U. S.) 518; Irwin v. Dixon, 9 How. (U. S.) 10; Georgetown v. Alexandria Canal Co., 12 Pet. (37 U. S.) 91, 9 L. Ed. 1012; Indianapolis Water Co. v. American Strawboard Co., 57 Fed. 1000; Spokane Mill Co. v. Post, 50 Fed. 429; Woodruf v. North Bloomfield Gravel Co., 18 Fed. 753; Roberts v. Matthews, 137 Ala. 523, 34 So. 624; Richards v. Daugherty, 133 Ala. 569, 31 So. 934; Crommelin v. Coxe, 30 Ala. 318, 68 Am. Dec. 120; Rosser v. Randolph, 7 Port. (Ala.) 238, 31 Am. Dec. 712; Little Rock Mississippi River & Texas R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277; Lind v. San Luis Obispo, 109 Cal. 340, 42 Pac. 437, under Cal. Civ. Code, § 3493; Hargro v. Hodgdon, 89 Cal. 623, 26 Pac. 1106; San Jose Ranch Co. v. Brooks, 74 Cal. 463, 16 Pac. 250; Kiel v. Jackson, 13 Colo. 378, 22 Pac. 504, 6 L. R. A. 254, 40 Am. & Eng. R. Cas. 297; Nolan v. New Britain, 69 Conn. 668, 38 Atl. 703; Frink v. Lawrence, 20 Conn. 117, 50 Am. Dec. 274; Burrows v. Pixley, 1 Root (Conn.), 362, 1 Am. Dec. 56; Savannah F. & W. R. Co. v. Gill, 118 Ga. 737, 45 S. E. 737; Savannah F. & W. R. Co. v. Parish, 117 Ga. 893, 45 S. E. 280, 14 Am. Neg. Rep. 540, 542 Civ. Code Ga. 1895, §§ 3858, 3859; Devaughn v. Minor, 77 Ga. 809, 1 S. E. 433; Ison v. Manley, 76 Ga. 804; Hamilton v. City of Columbus, 52 Ga. 435; South Carolina Railroad v. Moore & Philpot, 28 Ga. 418; Small v. Harrington (Idaho), 79 Pac. 461, Rev. Stat. 1887, § 3633; Redway v. Moore, 2 Idaho, 1036, 29 Pac. 104; Jacksonville v. Doan, 145 Ill. 23, 33 N. E. 878, aff. 48 Ill. App. 247; Wylie v. Elwood, 134 Ill. 281, 23 Am. St. Rep. 673, 9 L. R. A. 726, 25 N. E. 570, 46 Am. & Eng. R. Cas. 513, aff. 34 Ill. App. 244; Crane Co. v. Stammers, 83 Ill. App. 329; Martin v. Marks, 154 Ind. 549, 57 N. E. 249; Kaufman v. Stein, 138 Ind. 49, 37 N. E. 333, 46 Am. & Eng. Corp. Cas. 677, 46 Am. St. Rep. 368; Fossin v. Landry, 123 Ind. 136, 24 N. E. 96; Dwenger v. Chic. & G. T. Ry., 98 Ind. 153; Scheible v. Law, 65 Ind. 332; Platt v. Chicago B. & Q. R. Co., 74 Iowa, 127, 37 N. W. 107; School Dist. v. Neil, 36 Kan. 617, 59 Am. Rep. 575, 14 Pac. 253; Venard v. Cross, 8 Kan. 248; Bannon v. Rohmeiser, 17 Ky. L. Rep. 1378, 34 S. W. 1084, rehearing denied, 17 Ky. L. Rep. 1380, 35 S. W. 280; Bruning v. New Orleans Canal & Banking Co., 12 La. Ann. 541; Holmes v. Corthell, 80 Me. 31, 5 N. Eng. Rep. 793, 12 Atl. 730; Washburn v. Gilman, 64 Me. 163, 18 Am. R. 246; Brown v. Watson, 47 Me. 161, 74 Am. Dec. 482; City of Baltimore v. Marriott,

§ 423. **Same subject—Other statements of rule—Cause and effect.**—In Georgia the general rule of law is that a nuisance may at the same time be both public and private, and a recovery may

9 Md. 160; Stetson v. Faxon, 19 Pick. (Mass.) 147, 31 Am. Dec. 123; Page v. Mille Lacs Lumber Co., 53 Minn. 492; Pascagoula Boom Co. v. Dickson, 77 Miss. 587, 28 So. 724; Cummings v. St. Louis, 90 Mo. 259, 7 West 276; Schoen v. Kansas City, 65 Mo. App. 134; Easton & A. R. Co. v. Central R. Co., 52 N. J. L. 267, 31 Am. & Eng. Corp Cas. 262; Mehrhof Bros. Brick Mfg. Co. v. Delaware, & L. W. R. Co., 51 N. J. L. 26, 16 Atl. 12; Runyon v. Bordine, 14 N. J. L. 472; Wakeman v. Wilbur, 147 N. Y. 657, 42 N. E. 341, 71 N. Y. St. R. 266, revg. 21 N. Y. St. R. 556, 4 N. Y. Supp. 938; Leonard v. Spencer, 108 N. Y. 338, 15 N. E. 397, 11 Cent. Rep. 98, 13 N. Y. St. R. 653, 28 Wkly D. 368, affg. 34 Hun. 341; Milhau v. Sharp, 27 N. Y. 611, 26 How. 599n., 84 Am. Dec. 314, affd. 17 Abb. 220, 28 Barb. 228, which affd. 17 Barb. 435, 9 How. 102; Dimon v. Shewan, 34 Misc. R. 72, 69 N. Y. Supp. 402; Porth v. Manhattan R. Co., 33 N. Y. S. R. 709, 11 N. Y. Supp. 633, 26 Jones & S. (58 Super. Ct.) 366, affd. 134 N. Y. 615, 32 N. E. 649, 47 N. Y. St. R. 929; Irvine v. Atlantic Ave. R. Co., 10 App. Div. 560, 42 N. Y. Supp. 1103; Astor v. New York & A. Ry. Co., 3 N. Y. St. R. 188; De Laney v. Blizzard, 7 Hun, 7; Smith v. Lockwood, 13 Barb. (N. Y.) 209; Lansing v. Smith, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89; Reyburn v. Sawyer, 135 N. C. 328, 65 L. R. A. 930, 47 S. E. 761; Farmers' Co-Op. Mfg. Co. v. Albemarle & R. R. Co., 117 N. C. 579, 29 L. R. A. 700, 23 S. E. 43; Gordon v. Baxter, 74 N. C. 470; City of Roseburg v. Abraham, 8 Oreg. 509; Parrish v. Stephens, 1 Oreg. 73; City of Pittsburgh v. Scott, 1 Pa. 309; Horstman v. Young (Pa.), 13 Phila. 19; Smith v. Cummings, 2 Pars. Eq. Cas. (Pa.), 92; Clark v. Peckham, 10 R. I. 35, 14 Am. R. 654; Aldrich v. Howard, 7 R. I. 199; Richi v. Chattanooga Brewing Co., 105 Tenn. 651, 58 S. W. 646; Weakley v. Page (Tenn.), 53 S. W. 551; Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222; Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513; Smith v. Mitchell, 21 Wash. 536, 58 P. 667; Carl v. West Aberdeen Land & I. Co., 13 Wash. 616, 43 Pac. 890; Ryan v. Schwartz, 94 Wis. 403, 69 N. W. 178; Clark v. Chicago & N. W. R. Co., 70 Wis. 593, 5 Am. St. R. 187, 36 N. W. 326; Pettibone v. Hamilton, 40 Wis. 402.

Suit by private person is not for himself alone, but for the interests of all similarly injured. The court will consider not only the plaintiff's interest but also those of the public. Woodruff v. North Bloomfield Gravel Min. Co., 18 Fed. 753.

Title unnecessary to enable private person to sue for injury occasioned by public nuisance where he has possession and is otherwise within the rule as to special damage. Crommelin v. Coxe, 30 Ala. 318, 68 Am. Dec. 120.

Vested right obstructed is sufficient special injury upon which to base right of action. Ryan v. Schwartz, 94 Wis. 403, 69 N. W. 178.

be had by one who has suffered special damage by reason of sickness of himself or family, and he does not lose this right because others in the vicinity have similar rights of action. The rule also applies where the cause and effect are close and immediate, as when the inhabitants of a particular house are rendered sick by a pool of stagnant water in a city and the depreciated rental value of the residence is immediately and proximately due to a special and particular cause close at hand and that cause is produced by a violation of law or the maintenance of something contrary to law and which in its nature works hurt to those close by. And under the code in that State while a public nuisance is one which damages all persons which come within the sphere of its operations, though it may vary in its effect upon individuals, yet, if a public nuisance causes special damage to an individual in which the public does not participate, such special damage gives a right of action.[2] And under an early case in the same state it is declared that the general rule of law is that a private action will not lie for a public nuisance. It is the subject of indictment, not of action. The reason of the rule is that it creates a multiplicity of actions, one being as well entitled to bring an action as another. To this general rule there is an exception in the case of one who suffers a particular damage by the nuisance.[3] So one who has sustained special damage within the rule may have his action where the injury is either direct or consequential.[4]

§ 424. **Private injury—Public nuisance—Review of decisions—Instances.**—In Alabama chancery will sustain a bill filed by an individual to enjoin a nuisance which although it affects him, is also public in its character; but as one of the transcendent powers of the court it will be exercised sparingly.[5] It is also declared in that State that it is well settled that an individual who has sustained any particular special injury over and above that sustained

2. Savannah F. & W. R. Co. v. Parish, 117 Ga. 893, 45 S. E. 280, 14 Am. Neg. Rep. 540, 542, Civ. Code Ga. 1895, §§ 3858, 3859.

3. South Carolina R. R. v. Moore & Philpot, 28 Ga. 418.

4. Kuhn v. Illinois Cent. R. Co., 111 Ill. App. 323; Lansing v. Smith, 4 Wend. (N. Y.) 9, 21 Am. Dec. 89; Pittsburgh v. Scott, 1 Pa. 309.

5. Rosser v. Randolph, 7 Port (Ala.), 238, 31 Am. Dec. 712.

by the public generally, as the direct result of a public nuisance, may maintain a bill to enjoin it and this rule applies to the right of an owner of abutting or adjacent property to prevent, or redress an obstruction or perversion of a street to the private uses of the defendants, inconsistent with the rights of the public, where special injury would result to plaintiff and an erection by defendant of stone columns in front of its building projecting so far into the street as to deprive plaintiff of his easement of view in the public street constitutes a special injury, even though no actual damage is proved. Such a case differs from one of an action between adjacent property owners for an obstruction of view over private property for an easement of view from every part of a public street is a valuable right of which the owner of a building on a street should not be deprived by an encroachment on the highway by an adjacent proprietor.[6] In another case in the same State it is held that complainants who are the children, grandchildren and only heirs at law of one who owned a burying lot in lands conveyed and dedicated to a city, and in which a number of members of the family are buried, have such a special interest therein as will enable them to maintain a bill to remove an obstruction of an alley or public thoroughfare adjacent to said burial lot where such thoroughfare constitutes a public nuisance. A court of chancery unquestionably has jurisdiction to enjoin a public nuisance consisting of the permanent obstruction of a public street.[7] In a California case the court says: "There is no doubt but there are many nuisances which may occasion an injury to an individual for which an action will not lie by him in his private capacity, unless he can show special damage to his person or property differing in kind and degree from that which is sustained by other persons who are subjected to similar injury. Among such may be mentioned the invasion of a common and public right, which every one may enjoy such as the use of a highway, or canal, or public landing place. But this class of nuisances is confined in most cases to where there has been an invasion of a right which is common to every person in the community, and

6. First National Bk. of Montgomery v. Tyson (Ala. 1905), 39 So. 560.

7. Weiss v. Taylor (Ala. 1905), 39 So. 519.

not to where the wrong has been done to private property, or the private rights of individuals, although many individuals may have been injured in the same manner and by the same means. In the one case, the invasion is of a public right which injures many individuals in the same manner, although it may be in different degrees. In the other case no public or common right is invaded, but by the one nuisance the private rights and property of many persons are injured. Because the nuisance affects a great number of persons in the same way it cannot conclusively be said that it is a public nuisance and nothing more. The fact that a nuisance is public does not deprive the individual of his action in cases where, as to him, it is private and obstructs the free use and enjoyment of his private property."[8] In a case in the Court of Appeals in that State it is decided that the owner of property abutting upon a street or alley owns the incidental rights to ingress and egress as completely as he does the property to which the rights are incident and an infringement of these rights is a private wrong. And where the injury complained of being the obstruction of a public alley and therefore a public wrong, the plaintiff may have redress where it appears by proper averments that he suffers some injury in its nature special and peculiar to him and different in kind from that to which the public is subjected, and within this test is an allegation of an injury to a private right incidental to private property of the nature first specified; and the rule is none the less applicable because the wrong is committed in a manner which would render the party liable to an indictment for a common nuisance.[9] In Illinois it is declared that it is a well-established rule that where a person sustains, by reason of a public nuisance, a special damage different from that which is common to all, he is entitled to an action. The doctrine that special damage must be shown in order to justify a private action for injury growing out of a public nuisance, had its origin in the consideration of nuisances growing out of obstructions to highways and navigable streams. The strictness of the original rule has been greatly modified since the days of Lord Coke. The doctrine now is that a

8. Fisher v. Zumwalt, 128 Cal. 493, 496, 61 Pac. 82, per Cooper, C.

9. Harniss v. Bulpitt (Cal. Ct. App. 1905), 81 Pac. 1022.

nuisance may be at the same time both public and private. An individual, who receives actual damage from a nuisance, may maintain a private action for his own injury, although there may be many others in the same situation.[10]

§ 425. **Same subject.**—In Kentucky although the fact that several persons living in the vicinity of the alleged nuisance have united in a petition for the same relief may evidence the existence of a nuisance affecting all alike it does not follow that each may not have sustained a special injury. The fact that the injury is identical when applied to each does not make it such a public nuisance as would deprive the individual citizen of his right to redress.[11] In Maryland, one who seeks to enjoin at a private suit the construction of a railroad siding or switch for the use of steam cars must, even though it may become a public nuisance by reason of its nearness to a public road, by proper averments show that he will suffer some peculiar and special injury different in kind from that which will be occasioned to the general public, and an allegation that complainant has no exit to drive from his premises other than over such county road, the use of which will be interfered with and endangered by the construction of the railroad in question, is insufficient where there is no actual obstruction of such county road and it is not pretended that it cannot be used at all, but only that the safety and comfort of using it will be impaired and the complainant in using it would only encounter the same inconvenience in kind that would be suffered by others of the general public who might have occasion to use it. A railroad switch or siding is not a nuisance *per se*, but can only become so by reason of circumstances of location, construction or use, and in such case equity will not interfere unless under the allegations and proof there are substantial grounds for interference.[12] Under

10. Wylie v. Elwood, 134 Ill. 281, 287, 25 N. E. 570, 23 Am. St. Rep. 673, 9 L. R. A. 726, per Magruder, J.

11. Seifried v. Hays, 81 Ky. 377, 380, 50 Am. Rep. 167.

12. Davis v. Baltimore & Ohio R. Co. (Md. 1905), 62 Atl. 572.

Side tracks at railroad stations are an essential part of the road and are as much authorized and required as the main line and stations. Therefore, the mere location of such tracks and stations near to the property of others cannot give

a Missouri appeals case if a nuisance is no more than a public one under a statute declaring like things to be public nuisances, the remedy might be by indictment alone, but where it is a nuisance in fact which causes peculiar annoyance and injury to a private person and he is specially distressed and damaged thereby he may have his private remedy.[13] In a Nebraska case it is held that the process of injunction cannot be availed of by a private citizen to abate a purely public nuisance from which he suffers no special or peculiar injury of a continuing nature, for which an action at law will afford him no adequate remedy or redress, and that for a single injury capable of estimation in damages, although inflicted in the perpetration of a public wrong, compensation must be sought in a court of law. It is not enough to confer jurisdiction upon equity that the plaintiff has suffered damages special and peculiar to himself, and in which the public do not share, but such damages must be of such a character as to be incapable of being compensated and measured in damages. The law is well established that, if the damages suffered by an individual are of the same nature as those inflicted upon the public at large, they are not rendered special and peculiar, within the meaning of the rule, by the fact that they exceed the latter in degree. In order to be included within the rule they must differ from the latter in kind.[14]

rise to a liability for damages for the depreciation in value of property and annoyance and discomfort to an adjoining owner of property and for annoyance and discomfort occasioned by the carrying on of the railroad's business and the invasion of the plaintiff's home of noise, dust, odors, etc. If so, the same liability would arise to every one who might be annoyed by trains passing along the main line, and a judgment for plaintiff in such case will be reversed, there being no negligence in carrying on defendant's business and it appearing that plaintiff's property has not been damaged. St. Louis, San Francisco & Tex. Ry. Co. v. Shaw (Tex. Sup. Ct. 1906), 92 S. W. 30.

13. Scheurich v. Southwest Missouri Light Co., 109 Mo. App. 406, 420, 84 S. W. 1003, per Curiam.

14. George v. Peckham (Neb. 1905), 103 N. W. 664, per Ames, C., citing to the first proposition Ray & Colby v. Tenney, (Neb.), 97 N. W. 591; Hill v. Pierson, 45 Neb. 507, 63 N. W. 835; Eidemiller Ice Co. v. Guthrie, 42 Neb. 254, 28 L. R. A. 581, 60 N. W. 717; Shed v. Hawthorn, 3 Neb. 179; 2 Pomeroy's Eq. Jur. § 1349, citing to the second proposition O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N. E. 302, 57 L. R. A. 508; Jones v. City of Chanute, 63 Kan. 243, 65 Pac. 243; Gundlach v. Hamm, (Mich.) 64 N. W. 50.

In North Carolina, one suffering peculiar injury from a nuisance may sue in equity and is not restricted to an action for damages.[15] Under a Pennsylvania decision, where plaintiff declared as for a common or public nuisance with an averment of special damage and the plea was the general issue, an instruction that under the pleadings in the case plaintiff must show that defendants in opening the works and business complained of, were guilty of maintaining a common nuisance, which was inconvenient and troublesome to the whole neighbouring community in general, and that from the same the plaintiff suffered a special or peculiar injury, was properly refused. The court, however, said that for this reason alone it would hesitate to reverse the case.[16]

§ 426. **Same subject.**—In a Washington case a temporary injunction was issued to restrain the operation of a shooting gallery and a "tonophone" and "orchestrion" in connection with defendant's business, it being alleged that their operation constituted a public nuisance specially injurious to complainant.[17] In Texas a statute is not invalid because it gives to a citizen of a State a right to bring suit to prevent by means of the writ of injunction the habitual use, actual, contemplated or threatened, of any premises, place, building or part thereof, for the purpose of gaming, or exhibiting games prohibited by the laws of the State, as the legislature has power to designate the person or class of persons who may maintain actions to restrain and abate public nuisances, and when that is done the action is for all purposes an action instituted in behalf of the public, the same as though brought by the attorney-general or public prosecutor, and the fact that an act is criminal or quasi-criminal does not debar the legislature from providing that a public nuisance may be enjoined in equity, as in case of a gaming house.[18] In Washington an owner of a dwelling who is injured by nauseating and offensive smells from a slaughter house adjacent to the residence section of a city, which smells taint the at-

15. Reyburn v. Sawyer, 135 N. C. 328, 65 L. R. A. 930, 47 S. E. 761.

16. Price v. Grantz, 118 Pa. 402, 11 Atl. 749, 4 Am. St. R. 601.

17. Nisbet v. Great Northern Clay Co. (Wash. 1905), 83 Pac. 14.

18. *Ex parte* Allison (Tex. 1906), 90 S. W. 870. See, also, id. 90 S. W. 492.

mosphere and food in the house and render it unfit for habitation and depreciates its market value, sustains such a special injury as to be entitled to equitable relief even though the nuisance is a public one.[19] In a Wyoming case it is held that where the injury or damage, if any, resulting to plaintiff from an unauthorized or illegal assertion of a right to the exclusive possession of public lands on the part of defendant would be suffered, not alone by the plaintiff, but by all alike whose live stock graze in that locality, or who seek to enjoy the pasturage afforded by the grasses upon such public lands; the injury would be one to the public, and if a nuisance at all a public nuisance, and would therefore be within the elementary principle that private persons seeking the aid of equity to restrain a public nuisance must show some special injury peculiar to themselves, aside from and independent of the general injury to the public.[20]

§ 427. **Same subject continued—Wesson v. Washburn.**—In this Massachusetts case the court says: "A nuisance may exist which occasions an injury to an individual, for which an action cannot be maintained in his favor, unless he can show some special damage in his person or property, differing in kind or degree from that which is sustained by other persons who are subjected to inconvenience and injury from the same cause. The difficulty lies in the application of this principle. The true limit, as we understand it, within which its operation is allowed, is to be found in the nature of the nuisance which is the subject of complaint. If the right invaded or impaired is a common and public one, which every subject of the State may exercise and enjoy, such as the use of a highway, or canal, or public landing place, or a common watering place on a stream or pond of water, in all such cases a mere deprivation or obstruction of the use which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no valid cause of action in favor of an individual, although he may suffer inconvenience or delay greater in degree than others from

19. Wilcox v. Henry, 35 Wash. 591, 77 Pac. 1055.

20. Anthony Wilkinson Live Stock Co. v. McIlquam (Wyo. 1905), 83 Pac. 364.

the alleged obstruction or hindrance. The private injury in this class of cases is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private individuals. . . . But it will be found that in . . . cases . . . in which the . . . principle has been laid down, it has been applied to that class of nuisances which have caused a hindrance or obstruction in the exercise of a right which is common to every person in the community, and that it has never been extended to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their peace and comfort in their dwellings is impaired by the carrying on of offensive trades and occupations which create noisome smells or disturbing noises, or cause other annoyance and injuries to persons and property in the vicinity, however numerous or extensive may be the instances of discomfort, inconvenience and injury to persons and property thereby occasioned. . . . If, for example, a public way is obstructed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not be necessary in a prosecution for such a nuisance, to show that any one had been delayed or turned aside. The offence would be complete, although during the continuance of the obstruction no one had occasion to pass over the way. The wrong consists in doing an act inconsistent with and in derogation of the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also distinct, not only in degree but in kind, from that which is done to the whole public by the nuisance. But there is another class of cases in which the essence of the wrong consists in the invasion of private rights, and in which the public offence is committed, not merely by doing an act which causes injury, annoyance and discomfort to one of several persons who may come within the sphere of its operation or influence, but by doing it in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong

against the community, which may properly be the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong, so as to take away from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act. . . . The real distinction would seem to be this: that when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But where the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance." [21]

§ 428. **Private action—Public nuisance—Others similarly affected.**—The circumstance that many other property owners residing in the vicinity have also sustained special damages will not make the nuisance any less a private nuisance.[22] So, under a New York case, no matter how numerous the persons may be who have sustained peculiar damages each is entitled to compensation for his injury. The fact that numbers are injured does not make the nuisance common and so prevent redress to a single individual and exclude any remedy except by indictment.

21. Wesson v. Washburn Iron Co., 13 Allen (Mass.), 95, 100-103, 90 Am. Dec. 181, per Bigelow, C. J.

22. Kissel v. Lewis, 156 Ind. 233, 240, 59 N. E. 278, per Dowling, C. J. Savannah F. & W. R. Co. v. Parish, 117 Ga. 893, 45 S. E. 280, 14 Am. Neg. Rep. 540, 542; Crane Co. v. Stammers, 83 Ill. App. 329. See Spokane Mill Co. v. Post, 50 Fed. 429, 432; Wakeman v. Wilbur, 147 N. Y. 657, 663, per Curiam; Lansing v. Smith, 4 Wend. (N. Y.) 925, 21 Am. Dec. 89, per Walworth, C.

Need not be sole sufferer. Farmers' Co-Op. Mfg. Co. v. Albemarle & R. R. Co., 117 N. C. 579, 23 S. E. 43, 29 L. R. A. 700.

The distinction is that where the injury is common to the public and special to none redress must be by criminal prosecution in behalf of all.[23] Under a Washington decision a person may bring an action on behalf of himself and others whose rights are similarly affected, where it is brought on behalf of a class and the injury complained of is not common to the general public, but peculiarly affects such person, and those of his class, and the alleged acts or injury constitute a damage and special injury to him in which the general public do not share. The fact that others would suffer in the same way constitutes no bar to the maintenance of the action.[24]

§ 429. **Special private injury must be shown—Pleading.**—A special injury is not only necessary to an individual to enable him to recover in case of a public nuisance,[25] but such injury must be shown to exist as a prerequisite to such recovery.[25a] So, under a West Virginia decision a private injury actually sustained or justly apprehended must be shown to warrant an injunction. The special injury must be serious, reaching the substance and value of plaintiff's estate and be permanent in character where an individual seeks to restrain a public nuisance as in case of an obstruction to

23. Francis v. Schoellkopf, 53 N. Y. 152.

Though many persons affected each one injured may have a private action; such a case being a private nuisance as to each differs from one where a right is interfered with which the plaintiff enjoys in common with the public, as in case of an obstruction of a public highway. Meek v. De Latour (Cal. Ct. App. 1905), 83 Pac. 300, per Hall, J., in discussion of case.

24. Morris v. Graham, 16 Wash. 343, 345, 47 Pac. 752, 58 Am. St. Rep. 33, per Gordon, J.

25. Grigsby v. Clear Lake Water Co., 40 Cal. 396, 406.

25a. Mississippi & Mo. R. R. v. Ward, 2 Black (67 U. S.), 485; Indianapolis Water Co. v. American Strawboard Co., 57 Fed. 100, affg. 53 Fed. 970; Illinois, St. L. R. & C. Co. v. St. Louis, 2 Dill. (U. S. C. C.), 70, Fed Cas. No. 7007; Packet Co. v. Sorrels, 50 Ark. 466, 8 S. W. 683; Payne v. McKinley, 54 Cal. 532; Jarvis v. Santa Clara Val. R. Co., 52 Cal. 438; Bigelow v. Hartford Bridge Co., 14 Conn. 565, 36 Am. Dec. 502; Christian v. Dunn, 8 Kulp. 320, 6 Del. Co. Rep. 476; Chicago Gen. R. Co. v. Chicago B. & Q. R. Co., 181 Ill. 605, 54 N. E. 1026; Oglesby Coal Co. v. Pasco, 79 Ill. 164 (tenant in common); Innis v. Cedar Rapids I. F. & N. W. R. Co., 76 Iowa, 165, 40 N. W. 701, 2 L. R. A. 282 (not changed by Iowa Code, § 3331); School Dist.

a public highway.[26] Again, where a statutory nuisance is a public one, a private individual who has sustained such a special and peculiar injury as to entitle him to relief may give in evidence the facts entitling him to such relief where the necessary allegations are coupled with other averments stating a case for damages. The essential fact to be averred and proved, when an abatement of a nuisance is asked, and not simply compensation in damages for the mischief it entails, is that the annoyance or loss is continuous or recurrent and irreparable in damages.[27]

v. Neil, 36 Kan. 617, 59 Am. Rep. 575, 14 Pac. 253 (school district as plaintiff); Werges v. St. Louis C. & N. O. R. Co., 35 La. Ann. 641; Low v. Knowlton, 26 Me. 128, 45 Am. Dec. 100; Inhabitants of Winthrop v. New England Chocolate Co., 180 Mass. 464, 62 N. E. 969; McDonnell v. Cambridge R. Co., 151 Mass. 159, 23 N. E. 841 (when not entitled); Green v. Lake, 54 Miss. 540, 28 Am. Rep. 378; Baker v. McDaniel, 178 Mo. 447, 77 S. W. 531; Shed v. Hawthorne, 3 Neb. 179; Hill v. New York, 139 N. Y. 495, 30 N. E. 1090, 54 N. Y. St. R. 797, revg. 45 N. Y. St. R. 693, 18 N. Y. Supp. 399, which affd. 15 N. Y. Supp. 393; Milhau v. Sharp, 28 Barb. (N. Y.) 228, 7 Abb. Prac. 220; United States v. Choctaw O. & G. R. Co., 3 Okla. 404, 41 Pac. 729; Sparhawk v. Union Pass. Ry. Co., 54 Pa. 401; Thompson v. Charity Hospital of Pittsburg (Pa.), 31 Pitts. Leg. J. N. S. 15 (hospital); Tiede v. Schneidt, 105 Wis. 470, 81 N. W. 826 (slaughter house).

26. Talbott v. King, 32 W. Va. 6, 9 S. E. 48.

27. Scheurich v. Southwest Light Co., 109 Mo. App. 406, 423, 424, 84 S. W. 1003.

Sufficiency of pleading to show right to relief, see Mississippi & M. R. Co. v. Ward, 2 Black (67 U. S.), 485, 17 L. Ed. 311; Roberts v. Matthews, 137 Ala. 523, 34 So. 624; Harniss v. Bulpitt (Cal. Ct. App. 1905), 81 Pac. 1022; Spring Valley Water Works v. Fifield, 136 Cal. 14, 68 Pac. 108; Payne v. McKinley, 54 Cal. 532; Platte & D. Ditch Co. v. Anderson, 8 Colo. 131, 6 Pac. 515; New York, N. H. & H. R. Co. v. Long, 72 Conn. 10, 43 Atl. 559; Stone v. Miles, 39 Conn. 426; Dewey Hotel Co. v. United States Elec. L. Co., 17 App. D. C. 356; Brownhead v. Grant, 83 Ga. 451, 10 S. E. 116; Storm v. Barger, 45 Ill. App. 173; Kissel v. Lewis, 156 Ind. 233, 59 N. E. 478; Waltman v. Rund, 94 Ind. 225; Thelen v. Farmer, 36 Minn. 225, 30 N. W. 670; Smith v. McConathy, 11 Mo. 517; Dover v. Portsmouth Bridge, 17 N. H. 200; Young v. Scheu, 56 Hun, 307, 9 N. Y. Supp. 349, 30 N. Y. St. R. 608; Wilcken v. West Brooklyn R. Co., 1 N. Y. Supp. 791; Astor v. New York A. Ry. Co., 3 N. Y. St. Rep. 188; Ferrelly v. City of Cincinnati, 2 Disn. (Ohio) 516; City of Roseburg v. Abraham, 8 Oreg. 509, Code, § 330; Yost v. Philadelphia & R. R. Co. (Pa.), 29 Leg. Int. 85; Richi v. Chattanooga Brewing Co., 105 Tenn. 651, 58 S. W. 646; Meiners v. Frederick Miller Brew.

§ 430. **What essentials must exist to sustain private action—Public nuisance.**—In order to sustain a private action in cases of a public nuisance some special privilege or right in person or property as distinguished from the public right must have been actually violated, or there must exist an imminent or justly apprehended danger. The damage should be material and the injury particular, special, and peculiar beyond and distinct from that suffered by the public. It should also be different in kind and not merely different in degree.[28]

Co., 78 Wis. 364, 47 N. W. 430, 10 L. R. A. 586; Hall v. Kitson, 3 Pin. (Wis.) 296, 4 Chand. 20.

28. What essentials must exist to enable private action to be brought. See the following cases: Irwin v. Dixion, 9 How. (50 U. S.) 10; Georgetown v. Alexandria Canal Co., 12 Pet. (37 U. S.) 91, 9 L. Ed. 1012; Siskiyou Lumber & M. Co. v. Rostel, 121 Cal. 511, 53 Pac. 1118; Nolan v. New Britain, 69 Conn. 668, 38 Atl. 703; Frink v. Lawrence, 20 Conn. 117, 50 Am. Dec. 274; Nothingham v. Baltimore & P. R. Co., 3 MacArthur (D. C.), 517; Cannon v. Merry, 116 Ga. 291, 42 S. E. 274; Ison v. Manley, 76 Ga. 804; Stufflebeam v. Montgomery, 3 Idaho, 20, 26 Pac. 125; Oglesby Coal Co. v. Pasco, 79 Ill. 164; Platt v. Chicago, B. & Q. R. Co., 74 Iowa, 127, 37 N. W. 107; Jones v. City of Chanute, 63 Kan. 243, 65 Pac. 243; School Dist. v. Neil, 36 Kan. 617, 59 Am. Rep. 575, 14 Pac. 253; Beckham v. Brown, 19 Ky. L. Rep. 519, 40 S. W. 684; Henry v. Newburyport, 149 Mass. 582, 22 N. E. 75, 5 L. R. A. 179; Proprietors of Quincy Canal v. Newcomb, 7 Metc. (48 Mass.) 276, 39 Am. Dec. 778; Long v. Minneapolis, 61 Minn. 46, 63 N. W. 174; Swanson v. Mississippi & R. R. Boom Co., 42 Minn. 532, 44 N. W. 986, 7 L. R. A. 673; Glaissner v. Anheuser-Busch Brew. Assoc., 100 Mo. 508, 13 S. W. 707; Fogg v. Nevada C. O. R. Co., 20 Nev. 429, 23 Pac. 840, 43 Am. & Eng. R. Cas. 105; Dover v. Portsmouth Bridge, 17 N. H. 200; Humphreys v. Eastlack, 63 N. J. Eq. 136, 51 Atl. 775; Van Wagenen v. Cooney, 45 N. J. Eq. 24, 16 Atl. 689; Morris & E. R. Co. v. Prudden, 20 N. J. Eq. 530; Hinchman v. Paterson Horse R. Co., 17 N. J. Eq. 75; Allen v. Board of Chosen Freeholders, 13 N. J. Eq. 38; Halsey v. Rapid Transit St. R. Co., 47 N. J. Eq. 380, 46 Am. & Eng. R. Cas. 76, 20 Atl. 859; Hill v. New York, 15 N. Y. Supp. 393; Smith v. Lockwood, 13 Barb. (N. Y.) 209; Reyburn v. Sawyer, 135 N. C. 328, 65 L. R. A. 930, 47 S. E. 761; Farmers' Co-Op. Mfg. Co. v. Albemarle & R. R. Co., 117 N. C. 579, 29 L. R. A. 700, 23 S. E. 43; Frizzle v. Patrick, 59 N. C. 354; Ett v. Snyder, 5 Ohio Dec. 523; Parrish v. Stephens, 1 Oreg. 73; Rhymer v. Fretz, 206 Pa. 230, 55 Atl. 959; Sparhawk v. Union Pass. Ry. Co., 54 Pa. 401; Thompson v. Charity Hospital of Pittsburg (Pa.), 31 Pitts. Leg. J. N. S. 15; Brunner v. Schaffer, 11 Pa. Co. Ct. Rep. 550; Smith v. Cummings, 2 Pars. Eq. Cas. (Pa.) 92; Baltzeger v. Carolina Midland R.

§ 431. **Private action—Public nuisance—Sewage.**[29]—If deposits from a sewer constructed and maintained by a city causes peculiar injury to the owner of docks and constitutes a nuisance by preventing and interfering with the accustomed and lawful use of such docks, the city is liable.[30]

§ 432. **Private action—Public nuisance—Highways.**[31]—The obstruction of a public highway is an act in law which amounts to a public nuisance and a person who sustains a private and peculiar injury from such an act may maintain an action to abate the nuisance and recover the special damages by him sustained. The extent of the injury is not generally considered very important. It should be substantial, of course, and not merely nominal, and the fact that numerous other persons have been injured by the act is no ground for denial of relief. When the damage or injury is common to the public and special to no one, then redress must be obtained by some proceeding on behalf of the public and not by private action.[32]

Co., 54 S. C. 242, 71 Am. St. Rep. 789, 32 S. E. 358, 14 Am. & Eng. R. Cas. N. S. 845; South Carolina Steamboat Co. v. Wilmington C. & A. R. Co., 46 S. C. 327, 24 S. E. 337, 33 L. R. A. 541; Baxter v. Winooski Turnpike Co., 22 Vt. 114, 52 Am. Dec. 84; Beveridge v. Lacey, 3 Rand. (Va.) 63; Talbot v. King, 32 W. Va. 6, 9 S. E. 48; Tiede v. Schneidt, 105 Wis. 470, 81 N. W. 826; Mahler v. Brunder, 92 Wis. 477, 66 N. W. 502, 31 L. R. A. 695.

29. See §§ 293 *et seq.* herein.

30. Peck v. City of Michigan City, 149 Ind. 670, 49 N. E. 800, citing and considering State v. City of Portland, 74 Me. 268; Franklin Wharf Co. v. City of Portland, 67 Me. 46, 24 Am. Rep. 1; Brayton v. City of Fall River, 113 Mass. 218, 18 Am. Rep. 470; Haskell v. City of New Bedford, 108 Mass. 208; Richardson v. City of Boston, 19 How. (U. S.) 263, 270; 2 Dillon's Mun. Corp. (4th Ed.) §§ 1047, 1048, 1051, 1051a, and p. 1330 note; Beach on Pub. Corp. § 760; Harrison's Munic. Manual, p. 400; Tiedman on Munic. Corp. § 355.

Special damage from sewage. See Lind v. San Louis Obispo, 109 Cal. 340, 42 Pac. 437, under Cal. Civ. Code, § 3493; Jacksonville v. Doan, 145 Ill. 23, 33 N. E. 878, affg. 48 Ill. App. 247; Schoen v. Kansas City, 65 Mo. App. 134. See West Arlington Imp. Co. v. Mount Hope Retreat, 97 Md. 191, 54 Atl. 982; Sayre v. Newark, 58 N. J. Eq. 136. Compare Jones v. City of Chanute, 63 Kan. 243, 65 Pac. 243.

31. See § 212 *et seq*, herein.

32. Wakeman v. Wilbur, 147 N. Y. 657, 663.

That obstruction of highways gives private action. See Irwin v.

§ 433. **Private action—Public nuisance—Navigable waters.**[33] —A nuisance, such as an unreasonable or wanton obstruction of a navigable stream, a public highway, may be public in its general effect upon the public, and at the same time private as to those individuals who suffer a special and particular damage therefrom, distinct and apart from the common injury.[34] So an injunction against a public nuisance in navigable waters will be sustained in favor of a private individual suffering special damage, etc., especially if irreparable, where the law affords no adequate remedy.[35]

Dixion, 9 How. (50 U. S.) 10; Packet Co. v. Sorrels, 50 Ark. 466, 8 S. W. 683; Siskiyou Lumber & M. Co. v. Rostel, 121 Cal. 511, 53 Pac. 1118; Kiel v. Jackson, 13 Colo. 378, 22 Pac. 504, 6 L. E. A. 254, 40 Am. & Eng. R. Cas. 297; Hargro v. Hogdon, 89 Cal. 623, 26 Pac. 1106; Chicago Gen. Ry. Co. v. Chicago, B. & Q. R. Co., 181 Ill. 605, 54 N. E. 1026; Martin v. Marks, 154 Ind. 549, 57 N. E. 249; Fossin v. Landry, 123 Ind. 136, 24 N. E. 96; Miller v. Schenck, 78 Iowa, 372, 43 N. W. 225; Townsend v. Epstein, 93 Md. 537, 52 L. R. A. 409, 49 Atl. 629; Glaessner v. Anheuser-Busch Brew. Assoc., 100 Mo. 508, 13 S. W. 707; Cummings v. St. Louis, 90 Mo. 259, 7 West Rep. 276; Sheedy v. Union Press Brick Works, 25 Mo. App. 527; Wakeman v. Wilbur, 147 N. Y. 657, 42 N. E. 341, 71 N. Y. St. R. 266, revg. 21 N. Y. St. R. 556, 4 N. Y. Supp. 938; Irvine v. Atlantic Ave. R. Co., 10 App. Div. 560, 42 N. Y. Supp. 1103; Smith v. Mitchell, 21 Wash. 536, 58 P. 667; Fogg v. Nevada C. O. R. Co., 20 Nev. 429, 23 Pac. 840, 43 Am. & Eng. R. Cas. 105; examine McDowell v. Cambridge R. Co., 151 Mass. 159, 23 N. E. 841.

33. See §§ 272, 273, 326, herein.

34. Page v. Mille Lacs Lumber Co., 53 Minn. 492, 55 N. W. 608 (judgment vacated on rehearing for want of jurisdiction, 55 N. W. 1119).

35. Frink v. Lawrence, 20 Conn. 117, 50 Am. Dec. 274.

When private action lies for obstruction of navigable waters. Spokane Mill Co. v. Post, 50 Fed. Rep. 429 (obstruction of use for floating logs); Page v. Mille Lacs Lumber Co., 53 Minn. 492, 55 N. W. 608. Judgment vacated on rehearing for want of jurisdiction, 55 N. W. 1119 (navigable stream obstructed by booms, etc.); Pascagoula Boom Co. v. Dickson, 77 Miss. 587, 28 So. 724 (boom for logs); Farmers' & Co-Op. Mfg. Co. v. Albemarle & R. R. Co., 117 N. C. 579, 29 L. R. A. 700, 23 S. E. 43; Cart v. West Aberdeen Land & I. Co., 13 Wash. 616, 43 Pac. 890; examine Swanson v. Mississippi & R. R. Boom Co., 42 Minn. 532, 7 L. R. A. 673, 44 N. W. 986.

When private action will not lie for obstruction of navigable waters. See Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 983; Innis v. Cedar Rapids I. F. & N. W. R. Co., 76 Iowa, 165, 40 N. W. 701, 2 L. R. A. 282; Lammers v. Brennan, 46 Minn. 269; South Carolina Steamboat Co. v. Wilmington C. & A. R. Co., 46 S. C. 327, 24 S. E. 337, 33 L. R. A. 541; South Carolina Steam-

And a private person may maintain an action to restrain the construction of piers constituting a nuisance in the navigable waters of a State where he alleges and shows that such nuisance is specially injurious to himself and different from that sustained by the general public.[36]

§ 434. **Private action—Public nuisance—Bridges.**[37]—A person who suffers injury from a public nuisance in having his raft, boat or barge stopped by the building of a railroad bridge across a navigable stream, may have his action against the nuisancer for damages.[38] But where the erection of a bridge over a navigable stream obstructs navigation a suit to abate the obstruction cannot be maintained by an individual who does not show any injury or damage different in kind from that of any other person who might undertake to use the stream for purposes of navigation under similar circumstances; and where the only right the plaintiff is deprived of is the public right of navigation in the stream, it must be alleged and proven that he suffers some special or particular injury or damage different not only in degree but in kind from the injury or damage suffered by the public by such obstruction.[39]

§ 435. **Private action—Public nuisance—Wooden walls or buildings.**[40]—A plaintiff who shows no peculiar damage due to the breach of an ordinance in building a wooden wall of a house within three feet of the line of an adjoining lot cannot sustain a

boat Co. v. South Carolina R. Co., 30 S. C. 539, 4 L. R. A. 209; Jones v. St. Paul M. & M. R. Co., 16 Wash. 25, 47 Pac. 226.

36. Small v. Harrington, (Idaho, 1904), 79 Pac. 461; Rev. Stat. 1887, § 3633.

37. See § 274, herein.

38. Little Rock, Mississippi River & Tex. R. Co. v. Brooks, 39 Ark. 403, 43 Am. Rep. 277.

Private rights of action for injury caused by bridge. Pennsylvania v. Wheeling Bridge Co., 13 How. (54 U. S.) 518 (sustainable); Innis v. Cedar Rapids, I. F. & N. W. R. Co., 76 Iowa, 165, 40 N. W. 701, 2 L. R. A. 282 (action not maintainable); Viebbahn v. Board of Crow Wing County Comm'rs (Minn.), 104 N. W. 1089 (action sustained); Thompson v. New York & H. R. Co., 3 Sandf. Ch. (N. Y.) 625 (defendants not specially injured have no defense on ground of public nuisance.)

39. Thomas v. Wade (Fla. 1904), 37 So. 743.

40. See § 342, herein.

bill in equity against such erection, as where the "wooden side wall of defendant's house had no greater tendency to cause a lack of air or light at the plaintiff's premises, or to confine upon them or to in any way cause these noxious odors and disturbing noises than a wall of brick or stone which defendant might lawfully have put where he did the wooden wall. The wooden wall would be less of a protection in case of fire, and even might be a source of danger in that respect. But the use of land for building is one of the incidents of ownership. The erection upon it of structures which in themselves are not noxious or unusually dangerous is not a use in violation of the private rights of an adjoining owner, even if in some degree the enjoyment of the adjacent land is made less complete or beneficial than if the land were bare. The breach of the ordinance by the defendant is not an invasion of plaintiff's private right. All the injurious results of the erection of the defendant's building came not from his violation of the ordinance, but from the use of his land for building. The plaintiff shows no peculiar damage due to a breach of the ordinance, and no right to have private relief because of its violation." [41] But an injunction may be had where a wooden building is relocated contrary to the prohibition of a city ordinance and by reason of its proximity causes increased danger from fire and special injury is sustained by an adjoining lot owner.[42]

§ 436. **Private action—Public nuisance—Other instances.**—Within the rules above stated a private action lies where the use and enjoyment of property is injured;[43] or health injuriously af-

41. Hagerty v. McGovern, 187 Mass. 479, 73 N. E. 536, per Barker, J.

42. Kauffman v. Stein, 138 Ind. 49, 37 N. E. 336, 46 Am. & Eng. Corp. Cas. 677, 46 Am. St. Rep. 368. See McCloskey v. Kreling, 76 Cal. 511, 18 Pac. 433; Blanc v. Murray, 36 La. Ann. 162, 51 Am. Rep. 7; Horstman v. Young, 13 Phila. 19; Aldrich v. Howard, 7 R. I. 199. Compare Hagerty v. McGovern, 187 Mass. 479, 73 N. E. 536.

43. **Use and enjoyment of property.** See Northern P. R. Co. v. Whalen, 149 U. S. 157, 37 L. Ed. 686, 13 Sup. Ct. Rep. 822; Miller v. Long Island R. Co., Fed. Cas. No. 9, 580a; Savannah F. & W. R. Co. v. Parrish, 117 Ga. 898, 45 S. E. 280, 14 Am. Neg. Rep. 540, 542; Bonner v. Welborn, 7 Ga. 296; Adams v. Ohio Falls Car Co., 131 Ind. 375, 31 N. E. 57; Hamilton v. Whitridge, 11 Md. 128, 69 Am. Dec. 184; Kiel v. Jackson, 13 Colo. 378, 40 Am. & Eng.

fected,[44] as in case of stagnant waters breeding sickness;[45] where the injury arises from noxious, unwholesome odors or stenches;[46] where unwholesome, offensive odors, together with dust and smoke depreciates the value of one's premises and injures his residence as such;[47] where special injury is occasioned by a ditch in a city lane;[48] a wreck in a river in front of a city park;[49] a patrol of strikers interfering with a business;[50] a cemetery;[51] an obstruction of an alley preventing ingress and egress from the rear of private premises;[52] railway cars in a street hindering a lot owner's ingress and egress;[53] the wrongful construction of railroad tracks or the wrongful use or the abuse of use of a railroad;[54] deposits from river dredging, hindering access to land;[55] an injury occasioned

R. Cas. 297, 22 Pac. 504, 6 L. R. A. 254; Cain v. Chicago R. T. & P. R. Co., 54 Iowa, 255, 3 N. W. 736, 6 N. W. 268; Corby v. Chicago R. I. & P. R. Co., 150 Mo. 457, 52 S. W. 282.

44. Savannah F. & W. R. Co. v. Parish, 117 Ga. 898, 45 S. E. 280, 14 Am. Neg. Rep. 540, 542; De Vaughn v. Minor, 77 Ga. 809, 1 S. E. 433; Hamilton v. Columbus, 52 Ga. 435.

45. Savannah F. & W. R. Co. v. Parish, 117 Ga. 898, 45 S. E. 280, 14 Am. Neg. Rep. 540, 542; De Vaughn v. Minor, 77 Ga. 809, 1 S. E. 433.

46. Lind v. San Louis Obispo, 109 Cal. 340, 42 Pac. 497; Jacksonville v. Doan, 145 Ill. 23, 33 N. E. 878, affg. 48 Ill. App. 247; Sayre v. Newark, 58 N. J. Eq. 136, 42 Atl. 1068. Examine Jones v. Chanute, 63 Kan. 243, 65 Pac. 243; Fisher v. American Reduction Co., 189 Pa. 419, 42 Atl. 36. See § herein as to sewage.

47. Adams v. Ohio Falls Car Co., 131 Ind. 375, 31 N. E. 57.

48. Runyon v. Bordine, 14 N. J. L. 472.

49. Detroit Water Comm'rs v. Detroit, 117 Mich. 458, 76 N. W. 70, 5 Det. L. N. 305.

50. Vegelahn v. Gunter, 167 Mass. 92, 43 Cent. L. J. 464, 35 L. R. A. 722, 44 N. E. 1077. See Lyon v. Wilkins, 68 L. J. Ch. 146, 47 Wkly. R. 291, (1899) 1 Ch. 255, 63 J. P. 339, 79 L. T. N. S. 709.

51. Musgrove v. Catholic Church, 10 La. Ann. 431.

52. Bannon v. Rohmeiser, 17 Ky. L. Rep. 1378, 34 S. W. 1084, 17 Ky. L. Rep. 1380, 35 S. W. 280.

53. Kiel v. Jackson, 13 Colo. 378, 22 Pac. 504, 6 L. R. A. 254, 40 Am. & Eng. R. Cas. 297. See Cain v. Chicago R. I. P. R. Co., 54 Iowa, 255, 3 N. W. 736, 6 N. W. 268; Corby v. Chicago R. I. & P. R. Co., 150 Mo. 457, 52 S. W. 282.

As to railroads generally, see § 317, herein.

54. Glaessner v. Anheuser-Busch Brew. Assoc., 100 Mo. 508, 13 S. W. 707; Wilcken v. West Brooklyn R. Co., 1 N. Y. Supp. 791. See cases cited in last preceding note. Compare Fogg. v. Nevada C. O. R. Co., 20 Nev. 429, 23 Pac. 840, 43 Am. & Eng. R. Cas. 105; Miller v. Long Island R. Co., Fed. Cas. No. 9,580a.

55. Garitee v. Baltimore, 53 Md. 422.

by a private logway or elevated platform with a steam engine;[56] coal sheds, coal dust therefrom and noise of machinery therein;[57] an obstruction of a tide water basin to the injury of wharfage, dockage, etc., rights;[58] a beer garden which is a constant, continuous resort for fighting, lascivious, etc., persons;[59] places variously designated as houses of prostitution, of ill fame, brothels or disorderly, indecent or bawdy houses;[60] and a wooden station to an elevated railway, the material not being of the kind authorized.[61] Again, a person who has sustained such special damages, from the act of another who has raised a dam in violation of a statute as entitles him to a private remedy, the nuisance being a continuing one, and who has recovered double damages under a statute so providing, may have the nuisance enjoined, if the facts warrant, and the damages awarded are only for damages already sustained.[62] So, wantonly, unnecessarily or oppressively causing such smells as to annoy another in a special and peculiar degree beyond others in the immediate vicinity, and to create an abiding nuisance to the particular injury of the plaintiff's property is actionable; qualified, however, to this extent that a certain degree of offensive odor, which is unavoidably incident to a business, must be endured by the public.[63] And a grogshop which is a resort for disorderly persons who disturb and annoy one's family

56. Adams v. Ohio Falls Car Co., 131 Ind. 375, 31 N. E. 57.

57. Wylie v. Elwood, 134 Ill. 281, 25 N. E. 570, 9 L. R. A. 726, 46 Am. & Eng. R. Cas. 513, affg. 34 Ill. App. 244.

58. Easton & A. R. Co. v. Central R. Co., 52 N. J. L. 267, 31 Am. & Eng. Corp. Cas. 262, Atl.

59. Kissel v. Lewis, 156 Ind. 233, 59 N. E. 478.

60. Redway v. Moore, 2 Idaho, 1036, 29 Pac. 104, Idaho Rev. Stat. § 3633; Hamilton v. Whitridge, 11 Md. 128, 69 Am. Dec. 184; Weakley v. Page, (Tenn.), 53 S. W. 551; Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513.

61. Porth v. Manhattan R. Co., 33 N. Y. St. R. 709, 11 N. Y. Supp. 633, 58 Super. Ct. (26 Jones & S.) 366, affd. 134 N. Y. 615, 47 N. Y. St. R. 929, 32 N. E. 649.

62. Scheurich v. Southwest Missouri Light Co., 109 Mo. App. 406, 424, 84 S. W. 1003; Rev. Stat. 1899, § 8752. See Richards v. Daugherty, 133 Ala. 569, 31 So. 934.

As to dams, see §§ 319-327, 407, herein.

63. Pottstown Gas. Co. v. Murphy, 39 Pa. 257, 263.

As to noisome smells, see §§ 157 *et seq.* herein.

constitutes a special injury when located near his premises on the highway of which he owns the fee.[64] But the principles by which the court should be governed, in dealing with an application for a preliminary injunction against a liquor nuisance, under the statute, are the same as apply to proceedings to enjoin other kinds of public nuisances. The ten legal voters who unite in a petition represent the public as does the attorney-general in other cases. The fact that no one of them would suffer any damage by the continuance of the nuisance beyond that common to all law-abiding citizens is immaterial.[65]

§ 437. State or public entitled to remedy—Attorney-General or other prosecuting officer.—A State may sue in equity where the remedy at law for its protection is not so efficacious or complete as a perpetual injunction against interference with its rights; and where conflicting claims cannot be so completely or conclusively settled at law as by a comprehensive decree covering all the matters in controversy; and where proceedings at law or by indictment can only reach past or present wrongs and will not adequately protect the public interests in the future.[66] So a State, as a political corporation, has a right to institute a suit in any of its courts whether the general public welfare demands it, or it be required by its pecuniary interests and this applies to a right to obtain relief in equity.[67] And so the State may maintain an action to abate, at the instance or suit of, or in the name of the Attorney-General;[68] or it may have a rem-

64. Green v. Asher, 10 Ky. L. Rep. 1006, 11 S. W. 286.

As to liquor nuisance, see §§ 399-401, herein.

65. Carleton v. Rugg, 149 Mass. 550, 556, 5 L. R. A. 193, 22 N. E. 55, 14 Am. St. Rep. 550. See Davis v. Auld, 96 Me. 559, 53 Atl. 118.

66. Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 12 Sup. Ct. 689, 36 L. Ed. 537, where there was an illegal interference with the control by the State of the digging, mining and removing of phosphate rock and phosphatic deposits in the bed of Coosaw River. See general citations in "Notes on U. S. Reports," Vol. 12, p. 185.

67. People v. City of St. Louis, 10 Ill. (5 Gilm.) 351, 48 Am. Dec. 339.

68. See Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 565, 36 L. Ed. 537, 12 Sup. Ct. 689 (approved State v. Lord, 28 Oreg. 529, 31 L. R. A. 481, 43 Pac. 480). So in State v. Donovan, 10 N. D. 203, 86

edy by way of indictment,[69] for a public nuisance in an action properly brought by the Attorney-General.[70] So the Attorney-General, or other like public prosecutor may not only sue in the people's name, but he may sue without a private relator for equitable relief in a proper case.[71] Again a tippling house and gambling room may be so conducted as to be a public nuisance and the District Attorney of the county may bring a civil action, where the statute so provides, to abate such nuisance.[72] And a fair, in occupying a large portion of a public street, accompanied with noise, etc., is a public nuisance of which a court of equity has jurisdiction and may restrain by injunction at the instance of the solicitor general.[73]

§ 438. **Same subject.**—Taking possession of a public road and collecting tolls from the public for its user without authority of law constitutes a public nuisance, for which injunction is the proper remedy at the suit *ex relatione* of the prosecuting officer of the county,[74] and such officer in behalf of the people may maintain an action both legal and equitable in its character,[75] or he may bring an information *ex officio,* or upon relation of a private in-

N. W. 709, the action to abate was brought by the State upon the relation of the Assistant Attorney-General to abate a liquor nuisance kept and maintained by a druggist.

69. Commonwealth v. Clarke, 1 A. K. Marsh (Ky.), 323.

70. People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152. See Georgetown v. Alexandria Canal Co., 12 Pet. (37 U. S.) 91.

71. People v. Truckee Lumber Co., 116 Cal. 397, 58 Am. St. Rep. 183, 48 Pac. 374, 39 L. R. A. 581. Examine Walker v. McNelly, 121 Ga. 114, 48 S. E. 718 (liquor nuisance); Atty.-Genl. v. Jamaica Pond Aqueduct Corp., 133 Mass. 361 (draining pond to injury of health). See Georgetown v. Alexandria Canal Co., 12 Pet. (37 U. S.) 91; Newark Aqueduct Board v. Passaic, 45 N. J. Eq. 393, 18 Atl. 106, 46 N. J. Eq. 552; State v. Paterson (N. D.), 99 N. Y. 67 (liquor nuisance); State v. Donovan, 10 N. D. 203, 86 N. W. 709; Attorney-Genl. v. Pope (Can.), N. B. Eq. Cas. 272. Compare Attorney-Genl. v. Hane, 50 Mich. 447, 15 N. W. 549.

72. People v. Wing, 147 Cal. 379.

73. City Council of Augusta v. Reynolds (Ga., 1905), 50 S. E. 998.

74. State, Jump v. Louisiana, B. G. & A. Gravel Road Co. (Mo. App. 1906), 92 S. W. 153.

75. People v. Metropolitan Teleph. & Teleg. Co., 64 How. Pr. (N. Y.) 120, 11 Abb. N. C. 304, 31 Hun, 596, 2 C. P. 304.

dividual to restrain a public nuisance from being continued.[76] But it is also decided that where local officials have authority to protect the city streets the Attorney-General cannot maintain an action in behalf of the people of the State against a corporation to restrain commission of a nuisance in such streets.[77] An equity suit need not, however, necessarily be brought by the public law officer but the Legislature has power to designate by whom a suit, in case of a public nuisance, may be maintained, there being no constitutional provision to the contrary.[78] Again a prosecution may be maintained in behalf of the public for a public nuisance.[79] But in case of a private and not a public nuisance it is not necessary that either the State or the public prosecutor should apply for relief.[80]

§ 439. **Municipal and quasi municipal corporations entitled to remedy—English local authorities.**—A city may also, under proper circumstances, sue in equity,[81] and a municipal corporation can maintain an action in equity to obtain a mandatory injunc-

76. District-Atty. v. Lynn & B. B. R. Co., 16 Gray (Mass.), 242.

77. People v. Equity Gaslight Co., 141 N. Y. 232, 36 N. E. 194, 56 N. Y. St. R. 825, rev'g 3 Misc. 333, 52 N. Y. St. R. 317, 23 N. Y. Supp. 124.

78. Davis v. Auld, 96 Me. 559, 53 Atl. 118. See, further, as to statutory provisions, Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 37 L. Ed. 686, 13 Sup. Ct. 822, under Code Wash Ty. §§ 605, 606; Legg v. Anderson, 116 Ga. 401, 42 S. E. 720, Acts 1899, p. 73 ("blind tiger"); Ruff v. Phillips, 50 Ga. 130, under Rev. Code, § 4023; Littleton v. Fritz, 65 Iowa, 488, 54 Am. Rep. 19, Laws 20th Gen. Assemb. c. 143 (liquor nuisance); Winthrop v. New England Chocolate Co., 180 Mass. 464, 62 N. E. 969, Stat. 1894, c. 481, § 11 construed; Merritt Tp. v. Harp, 131 Mich. 174, 9 Del. L. N. 302, 91 N. W. 156, 1 Comp. Laws 1897, § 2268; Lane v. Concord, 70 N. H. 485, 85 Am. St. Rep. 643, 49 Atl. 687 (ordinance construed); Newark Aqueduct Board v. Passaic, 45 N. J. Eq. 393, 18 Atl. 106, 46 N. J. Eq. 552; Board of Health of Green Island v. Magill, 17 N. Y. App. Div. 249, 45 N. Y. Supp. 710; State v. Bradley, 10 N. D. 157, 86 N. W. 354, Rev. Codes, § 7605; Town of Britton v. Guy (S. D.), 97 N. W. 1045, Rev. Civ. Codes 1903, §§ 2400, 2403.

79. Charlotte v. Pembroke Iron Works, 82 Me. 391, 8 L. R. A. 828, 19 Atl. 902.

"Public" defined in action to abate. Jones v. City of Chanute, 63 Kan. 243, 65 Pac. 243.

80. King v. Morris & E. R. Co., 18 N. J. Eq. 397.

81. Pittsburgh v. Epping-Carpenter Co. (Pa.), 29 Pitts. L. J. N. S. 255; Town of Britton v. Guy (S.

tion compelling the removal of an encroachment upon one of its public streets,[82] and a city may maintain an action for the abatement of a nuisance consisting of the pollution of a natural stream running within its limits.[83] So where a city alleges the corporate capacity of a village as plaintiff, and that by some threatened act defendant will create a nuisance, or threatens to or is about to commit some act that will endanger the health of the inhabitants of the village or city, or that will result in damage to the property of the city or village, or may be the means of causes of action for damage against the city or village, equity will grant relief. This rule applies to a case where defendant seeks to connect his saloon with a narrow public bridge by erecting certain structures or connecting platform.[84] But a city cannot maintain an action in equity to abate a nuisance on a ground of injury to its citizens where the statute gives that remedy only to "any person injured thereby."[85] A town may also, where the statute so authorizes, and because of its interest in highways sue for equitable relief for an injury thereto,[86] or it may be entitled to a remedy where it sustains a special injury different from that of the general public.[87] And the selectmen of a town may, for the benefit of resi-

Dak.), 97 N. W. 1045; Huron v. Bank of Volga, 8 S. D. 449, 66 N. W. 815.

82. Wanwatosa v. Dreutzer, 116 Wis. 117, 92 N. W. 551, and such right is not dependent upon the prior making and service of any statutory order under the statute 1898, § 1330.

Action by city to abate—Obstruction of streets.—For the purpose of an exception of no cause of action, where a city alleges that certain property has been dedicated for streets, that the title thereto is vested in the public, for whom she is administering, that the public is deprived of the use thereof by persons who unlawfully occupy and obstruct the same, and that such obstruction is a public nuisance, and prays that the same be abated, and the facts alleged are not in dispute, as between the city and defendants, the former is the best judge as to whether the owner needs the use of the property. A cause of action is therefore disclosed, and the exception should be overruled. City of New Orleans v. New Orleans Jockey Club (La., 1905), 40 So. 331.

83. Belton v. Baylor Female College (Tex. Civ. App.), 33 S. W. 680.

84. Village of Sand Point v. Doyle (Idaho, 1905), 83 Pac. 598.

85. City of Ottumwa v. Chinn, 73 Iowa, 405, 39 N. W. 670, Code § 3331. See, also, Code, §§ 456, 482.

86. Merritt Tp. v. Harp, 131 Mich. 174, 91 N. W. 156, 9 Det. L. N. 302.

87. Dover v. Portsmouth Bridge, 17 N. H. 200.

dents of the town, have an injunction granted against a slaughter-house lawfully established.[88] So a town suffering special injury from a public nuisance in a highway may sue.[89] In a New Jersey case an injunction was sought compelling specific performance of an agreement relating to a tidal sewer and tidal chamber for collecting sewage by the non-performance of which it was alleged that the complainant township and its citizens were damaged in their property and their health menaced. The bill was not filed for the protection from an alleged nuisance of property owned by complainant, and the ownership of any property entitled to such protection was not alleged by the bill; it was held that as mere riparian owners of property situate on the tide water it was doubtful whether the township was entitled to such protection; that complainant was not charged by law with any such duties relating to the public health as to entitle it, independent of any contract, to file a bill for protection against a public nuisance common to all its citizens, and that the Attorney-General alone had that right.[90] In England it is held that local authorities may themselves sue for damages where they are actual owners of the property injured and also may, at the instance of the Attorney-General, have a public nuisance abated.[91] It is also decided that such authorities in London have both by statute and by common law the right to relief in equity to restrain vacant lands becoming a nuisance, except in certain cases where special authority is vested in them to abate such nuisance themselves.[92]

88. Watertown v. Mayo, 109 Mass. 315, 12 Am. Rep. 694.

89. Inhabitants of Charlotte v. Pembroke Iron Works, 82 Me. 391. See, also, Inhabitants of New Salem v. Eagle Mill Co., 138 Mass. 8.

90. Belleville Tp., Essex County, v. City of Orange (N. J. Eq., 1905), 62 Atl. 331.

91. Attorney-Genl. v. Cogan [1891], 2 Q. B. 100.

That special damage must have been suffered by such local authority to enable it to sue in its own name under English Public Health Act of 1875, § 107, see Tottenham Urban Dist. Council v. Williamson (C. A.), 65 L. J. Q. B. N. S. 591, 75 Law T. Rep. 238 [1896], 2 Q. B. 353.

92. Attorney-Genl. v. Tod-Heatly (Ch.), 75 Law T. Rep. 452, English Pub. Health (London), Act 1891.

§ 440. **Boards of health entitled to remedy—Sanitary inspector.**—A board of health is entitled to relief by injunction where the statute and city ordinance so provides and the nuisance endangers the public health,[93] and the duty of a local board of health to remove nuisances does not disentitle them to their remedy by injunction to restrain a nuisance wrongfully imported into their district.[94] And an agent appointed to make sanitary inspections may also bring suit.[95]

§ 441. **Aqueduct board entitled to remedy.** — An aqueduct board may sue in equity, not as a public agent, but as an individual where its private property is injured, even though authorized by statute to sue.[96]

§ 442. **Corporations entitled to remedy.**—A corporation injured as to its franchises may have equitable relief.[97] And it is no bar to the maintenance of an action against a corporation that the plaintiff was a stockholder and director thereof, where he had not actually co-operated with others to cause the nuisance.[98] A corporation may also institute proceedings against a bridge on the ground of private or irreparable damages.[99] So a religious corporation or church, whose ordinary use, occupation and enjoyment of its property is wrongfully injured and rendered physically uncomfortable,

93. Board of Health of Yonkers v. Copcutt, 140 N. Y. 12, 55 N. Y. St. R. 422, 23 L. R. A. 485, 35 N. E. 443, aff'g 24 N. Y. Supp. 625, 71 Hun, 149, 54 N. Y. St. R. 311.

That action must be brought in name of municipality under Pub. Health Law, § 21, as amended Laws 1895, chap. 203, see Board of Health of Green Island v. Magill, 17 N. Y. App. Div. 249, 45 N. Y. Supp. 710.

Not a prerequisite that board of health determine that nuisance exists to entitle party injured to sue. Baker v. Bohannan, 69 Iowa, 60, Laws 1880, § 16.

94. Atty.-General v. Colney Hatch Lunatic Asylums, 38 L. J. Ch. 265, L. R. 4 Ch. 146, 19 L. T. 708, 17 W. R. 240.

95. Commonwealth v. Alden, 143 Mass. 113, 9 N. E. 15.

96. Newark Aqueduct Board v. Passaic, 45 N. J. Eq. 303, 18 Atl. 106, 46 N. J. Eq. 552.

97. Boston & L. R. Corp. v. Salem & L. R. Co., 2 Gray (Mass.), 1.

98. Leonard v. Spencer, 108 N. Y. 338, 13 N. Y. St. R. 653, 28 Wkly. D. 368, 11 Cent. Rep 98, 13 N. E. 397, affg. 34 Hun, 341.

99. Pennsylvania v. Wheeling Bridge Co., 13 How. (54 U. S.) 518.

may be entitled to recover, damages, or, if the annoyance and discomfort is continuous, relief may be had in equity; and legislative authority given defendant will not operate to preclude a suit for an actual nuisance at the instance of a person suffering injury different from that of the public at large.[100] But an action on the case cannot be brought by trustees for disturbing religious worship by noise; there must be some injury to the property, immediate or consequential.[101] A suit may, however, properly be brought in the name of a church in its corporate capacity;[102] although a right to recover, or to equitable relief, may be so far limited by statute as to permit only of a remedy where the injury is to property.[103]

§ 443. **Landowner entitled to remedy—Landlord—Mortgagor—Riparian owners—Joinder.**—An action or suit may be brought by a landowner,[104] though he is not such owner at the time of the erection of the nuisance.[105] So a landlord may have his right of action where the wrongful act affects his interest in the property, but the question as to which party is entitled to recover for depreciation of rental value by the existence of a nuisance is said to have involved the courts in much perplexity.[106] A remedy also exists in favor of successive owners and occupants;[107] a

100. Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. Ed. 739, 2 Sup. Ct. 719.

101. First Baptist Church in Schenectady v. Utica & Schenectady R. Co., 6 Barb. (N. Y.) 313.

102. First Baptist Church in Schenectady v. Schenectady & Troy R. Co., 5 Barb. (N. Y.) 79.

103. Northern Pac. R. Co. v. Whalen, 149 U. S. 157, 13 Sup. Ct. 822, 37 L. Ed. 686.

104. Leonard v. Spencer, 108 N. Y. 338, 13 N. Y. St. R. 653, 28 Wkly. D. 368, 15 N. E. 397, 11 Cent. Rep. 98, aff'g 34 Hun, 341; Garland v. Aurin, 103 Ten. 555, 76 Am. St. Rep. 699, 53 S. W. 940.

105. Miller v. Keokuk & D. M. R. Co., 63 Iowa, 680, 16 N. W. 567.

106. Miller v. Edison Electric Illuminating Co., 184 N. Y. 17, 62 Cent. L. J. 243, 32 National Corp. Rep. 268, per Cullen, C. J., given in full in § 493, *post*, herein. See further, as to right of landlord to sue, Sporato v. New York City, 78 N. Y. Supp. 168, 75 N. Y. App. Div. 304; Francis v. Schoellkopf, 53 N. Y. 154. Compare Van Siclen v. New York City, 64 N. Y. App. Div. 437, 72 N. Y. Supp. 209; Rich v. Basterfield, 2 C. & K. 257; Simpson v. Savage, 37 Eng. L. & Eq. 374.

107. Staple v. Spring, 10 Mass. 72.

grantee of land subject to a nuisance,[108] even though having notice where the nuisance is continuing,[109] and even where the owner sells pending suit, he may recover damages;[110] although the lots which he owns are vacant.[111] Again, the fact that the property has been sold to a mortgagee does not prevent the mortgagor, still in possession, from maintaining an action to recover damages for a nuisance occasioned by smoke, soot, etc., and for loss of tenants.[112] And where the statute so provides an owner may, even though not in actual occupation of the land, sue where a fence is maliciously erected and is calculated to lessen his rentals or his comfort and enjoyment of his estate.[113] A lower riparian owner may also sue;[114] and lower riparian owners may sue jointly to restrain pollution of a stream, as they all have a common grievance for an injury of the same kind.[115] So abutting owners,[116] several[117] or separate owners,[118] and owners of distinct or several interests or tenements may join in an action;[119] and whether such premises are in their occupation or that of their tenants they may join with such tenants in an action.[120] But one who repurchases from his own grantee, there being no reservation, cannot recover for the

108. Eastman v. Amoskeag Mfg Co., 44 N. H. 143, 82 Am. Dec. 201; Townes v. Augusta, 52 S. C. 396, 29 S. E. 851. Examine Hughes v. General Electric Light & Power Co., 21 Ky. L. R. 1202, 54 S. W. 723.

As to coming into a nuisance see § 97, herein.

109. Townes v. Augusta, 52 S. C. 396, 29 S. E. 851.

110. Demby v. Kingston, 14 N. Y. Supp. 601, 38 N. Y. St. R. 42, 60 Hun, 294, aff'd 133 N. Y. 538, 44 N. Y. St. R. 929, 30 N. E. 1148.

111. Ruckman v. Green, 9 Hun (N. Y.), 225.

112. Lurssen v. Lloyd, 76 Md. 360, 367, 25 Atl. 294.

113. Smith v. Morse, 148 Mass. 407, 19 N. E. 393, Mass. Stat. 1887, chap. 348.

114. Middlestadt v. Waupaca Starch & P. Co., 93 Wis. 1, 66 N. W. 713.

115. Strobel v. Kerr Salt Co., 164 N. Y. 303, 58 N. E. 142, 51 L. R. A. 687, rev'g 49 N. Y. Supp. 1144.

116. Cadigan v. Brown, 120 Mass. 493.

117. Herrick v. Cleveland, 7 Ohio C. C. 470.

118. Sullivan, Town of, v. Phillips, 110 Ind. 320, 11 N. E. 30.

119. Grant v. Schmidt, 22 Minn. 1. See Peck v. Elder, 3 Sandf. (N. Y.) 126.

120. Snyder v. Cabell, 29 W. Va. 48, 1 S. E. 241. See Ingraham v. Dunnell, 5 Metc. (Mass.) 118; Doremus v. City of Paterson, 65 N. J. Eq. 711, 55 Atl. 304, rev'g 63 N. J. Eq. 605, 52 Atl. 1107.

period he was out of title even though he received the rents for his own use during said period,[121] nor can recovery be had by an adjoining owner from the fact that a building not *per se* a nuisance may become one.[122]

§ 444. **Parties entitled to remedy—Necessity of interest in land—Parties in possession.**[123]—It is held that it is not necessary that one residing on land should have an interest therein to warrant a recovery for an injury to his health.[124] Again, one who is lawfully in possession of land, even though he has no freehold estate, is entitled to recover for injury to such possession.[125] But plaintiffs cannot recover for any injury arising from a destruction of crops by reason of an alleged nuisance prior to the date of the conveyance of the land to them, unless they show that they were in possession of the property or entitled to such possession, and were entitled to recover for injuries to such possession.[126]

§ 445. **Lessee or tenant entitled to remedy — Joinder.** — Lessees or tenants in possession may maintain an action or suit for injury sustained during the tenancy.[128] And the fact that the

121. Thompson v. Pennsylvania R. Co., 51 N. J. L. 42, 15 Atl. 683.

122. Van De Vere v. Kansas City, 107 Mo. 83, 17 S. W. 675, 35 Am. & Eng. Corp. Cas. 104.

123. See §§ 408, 436, 445, herein.

124. Ft. Worth & R. G. R. Co. v. Glenn, 97 Tex. 586, 80 S. W. 992, 65 L. R. A. 618.

But as to husband living in wife's house compare Whalen v. Baker, 44 Mo. App. 290; Kavanagh v. Barber, 131 N. Y. 211, 30 N. E. 235, 43 N. Y. St. R. 283, 15 L. R. A. 689, rev'g 59 Hun, 60, 12 N. Y. Supp. 603, 35 N. Y. St. R. 430.

125. Hopkins v. Baltimore & P. R. Co., 6 Mackey (D. C.), 311; Bonner v. Welborn, 7 Ga. 296; Ellis v. Kansas City, St. J. & C. B. R. Co., 63 Mo. 131, 21 Am. Rep. 430; Cowes v. Harris, 1 N. Y. (1 Comst.) 223; Garland v. Aurin, 103 Tenn. 555, 53 S. W. 940, 76 Am. St. Rep. 699. See next section.

Action on case lies in favor of party in possession, even without title, for damages caused by a nuisance. Crommelin v. Coxe & Co., 30 Ala. 318, 68 Am. Dec. 120.

Allegation of ownership does not necessitate proof of title, as possession is sufficient. Quinn v. Winter, 7 N. Y. Supp. 755, 28 N. Y. St. R. 178.

126. Watson v. Colusa-Parrot Mining & Smelting Co. (Mont., 1905), 79 Pac. 14.

127. See § 444.

128. Central R. R. v. English, 73 Ga. 366; Ellis v. Kansas City R. R. Co., 63 Mo. 131, 21 Am. Rep. 436;

lease was made subsequent to the nuisance does not preclude the lessee's recovery.[129] Again, a person who has only a leasehold interest may sue in equity to enjoin the continuance of a nuisance, which is not one to the freehold, but one which occasions an injury to his business, for his right to maintain an injunction suit must be determined by the character of the injury done him, and the effectiveness of his remedies at law and not upon the title by which he holds the property in which he conducts the business injured.[130] So the fact that plaintiff does not own the premises which he occupies, but occupies it as a tenant, does not preclude him from a remedy where a nuisance affects his health and comfort and that of his family; and the right of the tenant as a plaintiff in injunction is destroyed neither because the joinder with him of the owner of the premises in the petition nor because of the fact of a joinder with him as a relator, where such tenant stands on his own rights and not on the owners.[131] And where a nuisance is not of a permanent character, and could not at any time be discontinued, a tenant can maintain an action for damages.[132] So a

State, Violett v. King, 46 La. Ann. 78, 14 So. 423; Bly v. Edison Elec. Illum. Co., 172 N. Y. 1, 64 N. E. 745, 58 L. R. A. 500, revg. 66 N. Y. Supp. 737; Pritchard v. Edison Elec. Illuminating Co., 92 N. Y. App. Div. 178, 87 N. Y. Supp. 225, affd. 179 N. Y. 364, 72 N. E. 243; Hoffman v. Edison Elec. Illuminating Co., 87 N. Y. App. Div. 371, 84 N. Y. Supp. 437; Dumois v. New York City, 76 N. Y. Supp. 161, 37 Misc. 614; Hudson R. R. Co. v. Loeb, 7 Rob. (30 N. Y. Super.), 418; Lockett v. Ft. Worth & R. G. R. Co., 78 Tex. 211, 14 S. W. 564. See Miller v. Edison Elec. Illum. Co., 184 N. Y. 17, 62 Cent. L. J. 243, 32 National Corp. Rep. 268, revg. 97 N. Y. App. Div. 638, which affd. 66 N. Y. App. Div. 470, 73 N. Y. Supp. 376, which rev'd 33 Misc. 664, 68 N. Y. Supp. 90 (case is given in full in the subdivision on damages, § 493, under this chapter.)

When lessee cannot sue. See Lapere v. Luckey, 23 Kan. 534, 33 Am. Rep. 196; Clark v. Thatcher, 9 Mo. App. 436.

Lessee—warehouse part of abutment of Brooklyn bridge, held not entitled to enjoin widening of viaduct. Ackerman v. New York & B. Bridge Trustees, 10 N. Y. App. Div. 22, 41 N. Y. Supp. 810.

129. Hoffman v. Edison Elec. Illuminating Co., 87 N. Y. App. Div. 371, 84 N. Y. Supp. 437.

130. Nisbet v. Great Northern Clay Co. (Wash., 1905), 83 Pac. 14.

131. State, Violett v. Judge, 46 La. Ann. 78, 84.

132. Lurssen v. Lloyd, 76 Md. 360, 367.

tenant of property situated in a city is the owner of its use for the term of his rent contract, even though he has no estate in the land and can recover damage for any injury to such use occasioned by the erection and maintenance of a nuisance, although it is a public one, in the street adjacant to or in the immediate neighborhood of the premises.[133] And an occupant of town lot or other lands, whether owner in fee, life tenant or lessee, may recover damages.[134] But a tenant's wife cannot, it is held, maintain an action after his decease.[135] A husband need not join his wife where they are tenants by the entirety;[136] Nor need a wife join the heirs of her deceased husband in a suit by her, where he had purchased the land with money derived from her father's estate, but had held the title thereto, she having held possession.[137] Nor need a tenant in common join his co-tenant.[138]

§ 446. **Other parties generally entitled to remedy—Joinder.**—A citizen injuriously affected in his health or whose life is endangered by a sewage nuisance may have the same enjoined.[139] So a statutory authorization to a citizen to bring a suit to enjoin a liquor nuisance is not unconstitutional.[140] A private party nominally sues for himself but really on behalf of all who are or may be injured. If the plaintiff has partners in the business affected by the nuisance he need not join them as plaintiffs.[141] There may, however, be such a community of interest, or the injury sustained may be of such common interest to all, that there may be a joinder

133. Bentley v. City of Atlanta, 92 Ga. 623.

134. Garland v. Aurin, 103 Tenn. 555, 76 Am. St. Rep. 699.

135. Ellis v. Kansas City R. R. Co., 63 Mo. 131, 21 Am. Rep. 436.

136. Demby v. Kingston, 38 N. Y. St. R. 42.

137. Houston E. & W. T. R. Co. v. Charwaine, 30 Tex. Civ. Ap. 633, 71 S. W. 401.

138. Woodruff v. Gravel Mining Co., 8 Sawy. (U. S. C. C.) 628.

139. Waycross City v. Hauk, 113 Ga. 963, 39 S. E. 577.

140. Littleton v. Fritz, 65 Iowa, 488, 22 N. W. 641, 54 Am. Rep. 19; State v. Bradley, 10 N. D. 157, 86 N. W. 354.

"Mayor and councilmen" in suit by individual citizens, under statutory authority, as words of description are surplusage and will be stricken out. Legg v. Anderson, 116 Ga. 401, 42 S. E. 720.

141. Mississippi & Mo. R. R. Co. v. Ward, 2 Black (67 U. S.), 485, 17 L. Ed. 311.

of several parties plaintiff.[142] But where employees get intoxicated by liquor voluntarily purchased by them at a house where it is kept, their employer's interest in them and their services is not such as to entitle him to equitable relief against such house as a nuisance.[143]

§ 447. **Person creating nuisance liable—General rule.** — It is a general rule that the person who erects, constructs, or creates a nuisance is liable,[144] for the injury thereby occasioned in such civil or criminal action, suit or proceeding, as the nature of the nuisance and the surrounding attendant circumstance warrant. While this rule runs through the decisions as a fundamental one, nevertheless, it is subject to such extensions, qualifications, limitation, exception and conditions as hereinafter appear.

§ 448. **Liability of municipal and quasi muincipal corporations.**[145]—Subject to certain exceptions and qualifications,[146] the general rule is that a municipal corporation cannot injure another in his property or personal rights by erecting, creating or maintaining a nuisance any more than a natural person and it is liable in the same manner.[147] So where a city's

142. Demarest v. Hardhan, 34 N. J. Eq. 469; Davidson v. Isham, 9 N. J. Eq. 186; Astor v. New York & A. R. Co., 3 N. Y. St. R. 188; Jung v. Neraz, 71 Tex. 396, 9 S. W. 344. Examine Ruff v. Phillips, 50 Ga. 130; Doremus v. City of Paterson, 65 N. J. Eq. 711, 55 Atl. 304, revg. 63 N. J. Eq. 605, 52 Atl. 1107; Brady v. Weeks, 3 Barb. (N. Y.) 157; Peck v. Elder, 3 Sandf. (N. Y.) 126; Watertown v. Cowen, 4 Paige (N. Y.), 510, 27 Am. Dec. 80; Sparhawk v. Union Pass. R. Co., 54 Pa. 401.

143. Northern P. R. Co. v. Whalen, 149 U. S. 157, 13 Sup. Ct. 822, 37 L. Ed. 686.

144. Grady v. Wolsner, 46 Ala. 381, 7 Am. Rep. 593; Conner v. Hall, 89 Ga. 257, 15 S. E. 308; Jordan v. Helwig, 1 Wils. (Ind.) 447 (approved but distinguished Helwig v. Jordan, 53 Ind. 21, 23, 21 Am. Rep. 189); Staple v. Spring, 10 Mass. 72; Plumer v. Harper, 3 N. H. 88, 14 Am. Dec. 333; Brown v. Woodworth, 5 Barb. (N. Y.) 550; Anderson v. Dickie, 26 How. Pr. (N. Y.) 105; Lohmiller v. Indian Ford Water Power Co., 51 Wis. 683, 8 N. W. 601.

145. See §§ 264, 347, 353-358, herein.

146. Liability of municipal and quasi-municipal corporations.— Negligence.— Officers and agents.—Ministerial, etc., acts. See §§ 279, *et seq.*, 354, herein.

147. Valparaiso v. Moffit (Ind.

sewage pollutes the water of a river to an almost intolerable degree, a preliminary injunction will issue pending summary hearing.[148] And an indictment lies against a city for maintaining a sewer outfall into the sea which constitutes a permanent injury to health and a failure in performance of a public duty.[149] But it is held that a city is not liable for loss of life occasioned by an explosion of fire works during political campaigns and celebrations where the acts of its aldermanic board, in suspending at such period a prohibitory ordinance as to fireworks, amounts

App.), 39 N. E. 909; Willett v. St. Albans, 69 Vt. 330, 38 Atl. 72. Examine, also, the following cases: Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U. S. 317; City of Birmingham v. Land, 137 Ala. 538, 34 So. 613; Union Springs v. Jones, 58 Ala. 654; Atlanta v. Warnock, 91 Ga. 210, 18 S. E. 135, 23 L. R. A. 301; Butler v. Mayor of Thomasville, 74 Ga. 570; Hamilton v. Mayor of Columbus, 52 Ga. 435; Phinizy v. Augusta, 47 Ga. 263; Morrison v. Hinkson, 87 Ill. 587, 29 Am. Rep. 77; Jacksonville v. Lambert, 62 Ill. 519; Seymour v. Cummins, 119 Ind. 148, 5 L. R. A. 126; Ross v. Clinton, 46 Iowa, 606, 26 Am. Rep. 169; Long v. City of Emporia, 59 Kan. 46, 51 Pac. 897; State v. Portland, 74 Me. 268, 43 Am. Rep. 586; Franklin Wharf Co. v. Portland, 67 Me. 46, 24 Am. Rep. 1; Boston Rolling Mills v. Cambridge, 117 Mass. 396; Washburn Mfg. Co. v. Worcester, 116 Mass. 458; Brayton v. Fall River, 113 Mass. 218, 18 Am. Rep. 470; Ashley v. Port Huron, 35 Mich. 296, 24 Am. Rep. 552; State v. Dover, 46 N. H. 452; Field v. West Orange, 36 N. J. Eq. 118; Dumois v. New York City, 76 N. Y. Supp. 161, 37 Misc. 614; Noonan v. Albany, 79 N. Y. 480; Lynch v. Mayor of New York, 76 N. Y. 60, 32 Am. Rep. 271; Byrnes v. City of Cohoes, 67 N. Y. 204, affg. 5 Hun, 602; Farrell v. Mayor of N. Y., 5 N. Y. Supp. 580, 22 N. Y. St. R. 469, affg. 20 N. Y. St. R. 12, 5 N. Y. Supp. 672; Radcliff v. Mayor of Brooklyn, 4 N. Y. 195, 53 Am. Dec. 157; City of Cleveland v. Beaumont, 2 Ohio Dec. 172, 4 Ohio Dec. reprint 444; Inman v. Tripp, 11 R. I. 520, 23 Am. Rep. 520; Chattanooga v. Dowling, 101 Tenn. 344, 47 S. W. 700; Chalkley v. Richmond, 88 Va. 402, 14 S. E. 339, 15 Va. L. J. 66; Harper v. Milwaukee, 30 Wis. 365.

Petition must show municipality's control over alleged nuisance. See Martinowsky v. Hannibal, 35 Mo. App. 70.

When proceeding in nature of bill of review against city lies at instance of citizen to enforce decree. See State v. Mobile, 24 Ala. 701.

148. Grey (Simmons) v. Paterson, 58 N. J. Eq. 1, 42 Atl. 749.

149. State v. Portland, 74 Me. 268, 43 Am. Rep. 586. See Kolb v. City of Knoxville, 111 Tenn. 311, 76 S. W. 823.

to a repeal of such ordinance and not to a license.[150] And although a city permits a railroad to improve its right of way by lowering its tracks, it is held not liable to an abutting occupant for the damage consequent upon smoke, noise, etc., necessitated by such work, it not appearing that such occupant was injured by the change of grade.[151] And, although the licensee of wagons for the transfer and deposit of refuse maintains them in such a condition as to constitute a nuisance, still the city granting such license is not liable.[152] A town may also be liable under a statutory provision.[153] And an indictment may be had against a borough.[154]

§ 449. **Liability of officers of municipal, etc., corporations.**—A board of chosen freeholders may be indicted for neglect of duty where it is necessary to build or repair a bridge over a highway and they wilfully refuse to do so. It is not within their discretion to determine whether the road is necessary, but the limit of such discretion is the determination of the necessity of the bridge, assuming the road to be necessary; purposes of travel are paramount, and the freeholders must exercise their discretion in such a manner as to make the highway passable and safe, and they cannot, without dereliction of duty, refuse to provide a bridge when required for such use and safety of the highway.[155] It is also held that where a nuisance is occasioned by the operation of cars, owing to the liability of the trolley wires to fall on account of their poor condition, and the mayor and chief of police of a municipality arrest the motorman, to abate such nuisance, damages may be recovered against them, when, by removing the con-

150. Landau v. New York City, 90 N. Y. App. Div. 50, 85 N. Y. Supp. 616.

151. Thompson v. Macon, 106 Mo. App. 84, 80 S. W. 1.

152. Kolb v. Knoxville City, 111 Tenn. 311, 76 S. W. 823.

153. Merritt Tp. v. Harp, 131 Mich. 174, 9 Det. L. N. 302, 91 N. W. 156.

154. Commonwealth v. Ephrata, 2 Pa. Dist. R. 349, 10 Lanc. L. Rev. 51.

155. Bergen County Chosen Freeholders v. State, 42 N. J. L. 263.

Judgment and order to repair bridges erroneous where chosen freeholders convicted. Bergen County Chosen Freeholders v. State, 42 N. J. L. 263.

trollers or cutting the wires, the same object could be accomplished.[156] But where male and female persons congregate upon the highway and conduct themselves lasciviously and otherwise indecently, the mayor and common council who do not prevent the same are held subject to an indictment as for permitting a nuisance.[157] The burning, however, of infected bedding and clothing by city authorities, to prevent the spread of smallpox during an epidemic, does not constitute an indictable nuisance, where the safety of others is provided for by proper precautions, even though noxious smoke and vapors are produced to the inconvenience of a few persons.[158]

§ 450. **Liability of private corporations.**—While this subject has been considered at length under numerous sections throughout this work, it may be stated here that a private corporation may be held liable in a civil action for creating and maintaining a nuisance.[159] So a charitable institution may be liable.[160] Again, a railway and light company, which is a public service corporation within a constitutional definition, is to be considered in two as-

156. Mumford v. Starmont (Mich.), 69 L. R. A. 350, Amer. Lawyer, p. 27, 102 N. W. 662.

Liability of county supervisors and officers controlling public property for pollution of stream by sewage from almshouse. See Lefrois v. Monroe County, 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206, revg. 24 N. Y. App. Div. 421, 48 N. Y. Supp. 519.

When chief burgess and town council of borough indictable. See Commonwealth v. Ephrata, 10 Lanc. L. Rev. 51, 2 Pa. Dist. R. 349.

Disqualification of town council permits of equitable jurisdiction under statute to abate. Hill v. McBurney Oil & Fertilizer Co., 112 Ga. 788, 38 S. E. 42, 52 L. R. A. 398.

157. Commonwealth v. Kinnaird, 18 Ky. L. Rep. 647, 37 S. W. 840. See §§ 262-264, 345, 357, herein.

158. State v. Mayor and Aldermen of Knoxville, 12 Lea (80 Tenn.), 146, 47 Am. Rep. 331.

159. Columbian Athletic Club v. State, 143 Ind. 98, 40 N. E. 914, 28 L. R. A. 727; Evansville C. R. Co. v. Dick, 9 Ind. 433; Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 317, 5 Am. Neg. Rep. 647, 10 Am. & Eng. Corp. Cas. N. S. 451, 44 L. R. A. 508, 56 Pac. 358, 74 Am. St. Rep. 602n.

160. Deaconess Home & Hospital v. Bontjes, 104 Ill. App. 484; Kerr v. Central Ky. Lun. Asy., 22 Ky. L. Rep. 1722, 61 S. W. 283.

pects. It has duties which it owes to the public and which it must perform. It has other duties not of a public nature which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. And where the language of a statutory authority to carry on a certain business is not imperative, but permissive, and no statutory authority is conferred to commit a nuisance in any way whatever, such corporation will be liable for a nuisance caused by noise, vibration, smoke and escape of electricity.[161] An exception has, however, been made where some other remedy is provided by charter.[162] Corporations are also liable to indictment for creating and maintaining a public nuisance,[163] and a foreign corporation has been held subject thereto.[164] So where railroad trains are without warning, run at excessive speed when crossing a highway, it may constitute an indictable nuisance.[165] But it is held that when a railroad corporation is in a receiver's hands it cannot be indicted for obstructing a highway by stopping trains.[166] And although a nuisance may be created by a compress company with relation to cotton in its sheds, yet that does not make a railroad

161. Townsend v. Norfolk Ry. & Light Co. (Va., 1906), 52 S. E. 970; § 153, Art. 12 of Const. (Va. Code 1904, p. ccxlix).

162. Commonwealth v. Frankford & B. Turnp. R. Co., 9 Pa. Co. Ct. 103.

163. People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L. R. A. 722; State v. White, 96 Mo. App. 100, 69 S. W. 684; Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 317, 10 Am. & Eng. Corp. Cas. N. S. 451, 5 Am. Neg. Rep. 647, 74 Am. St. Rep. 602-n, 44 L. R. A. 508, 56 Pac. 358; State v. Western, etc., R. Co., 95 N. C. 602. See, also, Commonwealth v. New Bedford Bridge Co., 2 Gray (Mass.), 339; Susquehanna, etc., Turnpike Co. v. People, 15 Wend. (N. Y.) 267; Louisville R. R. Co. v. State, 3 Head (Tenn.), 523.

State must show corporate existence in information against corporation. Acme Fertilizer Co. v. State, 34 Ind. App. 346, 72 N. E. 1037.

When corporation cannot be prosecuted. — Statutory provisions. See Paragon Paper Co. v. State, 19 Ind. App. 314, 49 N. E. 600.

164. State v. Paggett, 8 Wash. 579, 36 Pac. 487.

165. Louisville, Cincinnati & Lexington R. Co. v. Commonwealth, 80 Ky. 143, 44 Am. Rep. 468.

As to use of highways by railroads see §§ 242, *et seq.*, herein.

166. State v. Vermont Cent. R. Co., 30 Vt. 108.

corporation, with which it exchanges receipts for a bill of lading, liable.[167] In Ohio, under the statutes, any person or corporation in that State who corrupts and renders unwholesome or impure, any water course, stream or water, to the injury and prejudice of others, may be indicted and prosecuted therefor, in any county into which the stream or water course passes whose inhabitants are aggrieved or injured thereby; although the refuse or other unwholesome substance may have been introduced into said stream or water course in another county in that State, and such statutes are constitutional and within the exercise of a legitimate legislative power.[168]

§ 451. **Same subject—Opinions of text-writers.**—The question of the liability of private corporations in this connection has been the subject of much discussion. Mr. Morawitz makes the following distinction: "There are, however, certain classes of crimes which do not depend upon the intention of the offender at all, and which are not distinguishable from simple torts, except by the fact that in the one case an individual sues for damages on account of a private wrong, and in the other case the State sues for a penalty on account of a public wrong. In these cases the crime consists of the act alone, without regard to the intention with which it was committed; and there is no difficulty in attributing an offense of this character to a corporation, since it may be committed entirely by agent. Accordingly, it has been held that a corporation may be indicted for causing a public nuisance.[169] The late Judge Thompson says: "The liability of private corporations for public and private nuisances rests upon the same ground as

167. St. Louis, I. M. & S. R. Co. v. Commercial U. Ins. Co., 139 U. S. 223, 11 Sup. Ct. 554, 35 L. Ed. 154.

168. American Strawboard Co. v. State, 70 Ohio St. 140, 71 N. E. 284.

Jurisdiction. — Constitutionality of statute. Section 6920 Rev. Stat. providing that certain offenses (nuisances) "shall be construed and held to have been committed in any county whose inhabitants are or have been injured or aggrieved thereby" is constitutional and not in conflict with section 7263 of the Revised Stat. And this is so even if it be admitted that the statute changes the rule of common law as to jurisdiction. American Strawboard Co. v. State, 70 Ohio St. 140, 71 N. E. 284.

169. Morawitz on Private Corporation (Ed. 1882), § 94.

that of individuals, but with this difference: Corporations frequently attempt to justify on the ground that the doing of the act which is charged to be a nuisance is authorized by their charter or governing statute, in which case there are two theories: 1. The theory of the ancient common law that whatever the Legislature (in America within the limits of its constitutional power), authorizes a corporation to do, is for that reason lawful, and, being lawful, cannot be regarded as a nuisance, public or private, and is hence neither indictable nor actionable. 2. The other is, that a general legislative authorization to a corporation, to do a given act for its own emolument, although incidentally for the public benefit, is never construed as a license to do the act without paying damages to individuals, if individuals are damnified by the doing of it; and that, while the grant of power to do the act will estop the State from prosecuting an indictment against the corporation for a public nuisance consisting of the doing of the act, there is always an implication or reservation, founded on the principles of justice, that, in case a private individual is damnified by the doing of the act, the corporation will make compensation. Between the limits of these two doctrines a wide field is left open for speculation and casuistry, and cases are not wanting where the same court, without any wide interval of time, has come to widely opposite conclusions, while professing to adhere to a uniform principle."[170] Mr. Wharton says: "In some jurisdictions in this country, it is true it was once held that a corporation cannot be indicted for a nuisance in obstructing highways or rivers by its agents, the ground being the now exploded distinction between misfeasance and nonfeasance. But in England, after a full consideration of the authorities, a contrary principle was established. It was ruled there that an indictment lay at common law against an incorporated railway company for cutting through and obstructing a highway in a manner not comformable to the powers conferred on it by act of Parliament. The case was put on general grounds, and the distinction which has been attempted between nonfeasance

170. Thompson's Comm. on the Law of Corp. § 6284. See, also, id. §§ 4996, 5910, 5911, 6418, 6422-6425, 6359, 6590, 7774, and article on Corporations by same author, 10 "Cyc." pp. 1224 (d), 1225, *et seq.*

and misfeasance were overthrown. Indeed, since it has been settled against some of the earlier authorities that trespass or case, for a private nuisance, would lie against a corporation, no good reason can be assigned why the same acts, when to the injury to the public at large, may not equally be the basis of criminal proceedings. And such is now generally considered to be the law when the object is the imposition of a fine on the corporation estate, or the abatement of a nuisance, a corporation being justly held to be as indictable for a misfeasance as for a nonfeasance." [171] Mr. Bishop says: "Corporations can commit criminal nuisance the same as individuals," [172] and, in another section, he adds: "The limits of the liability to indictment depend chiefly on the nature and duties of the particular corporation, and the extent of its powers in the special matter, and though a corporation cannot be hung, there is no reason why it may not be fined or suffer the loss of its franchise for the same act which would subject an individual to the gallows." [173] Mr. Cook says: "After much discussion the general rule is now firmly established that corporations can not make defense to actions in tort by claiming that the acts by which the wrongs have been committed are not within the corporate powers conferred upon them. Since corporations are not in themselves capable of an evil intent, they can be indicted only for such offenses as arise from misfeasance—such as a nuisance." [174]

§ 452. **Liability of officers of corporations.**—The officers of a corporation are jointly responsible for the business of a corporation, and where a nuisance is created and maintained, the directors and officers are the ones primarily responsible, and, therefore, the proper ones to be prosecuted. Nor is it necessary to a conviction that they should have been actively engaged in work upon the premises, the work being carried on by employees.[175] So it is the

171. Wharton's Crim. Law. (10th Ed.), § 91.

172. Bishop's New Crim. Law (8th Ed.), § 419 (2).

173. Bishop's New Crim. Law (8th Ed.), § 423.

174. Cooke on Corp. (4th Ed.), § 15b.

175. People v. Detroit White Lead Works, 82 Mich. 471, 9 L. R. A. 722, 46 N. W. 735.

duty of the directors of a corpora
nuisances by their corporation throu
the line of their duties.[176] And th
ager of a corporation are personal
to a riparian proprietor by the long
water into a stream from ore wash
with their sanction and their kno
thereby.[177] In this case the court
poration, or of an individual, comm
liable for the same; and it matters
to the principal for the tort, the age
called upon to do so. This principl
tion, founded upon the soundest l
public policy. It is sanctioned by
commends itself to every enlighten
agent of a corporation, in carrying o
and injuries upon others, and then
behind his vicarious character, wou
courage the perpetration of flagrant
of insolvent and irresponsible corp
stimulate the zeal of responsible an
ble and insolvent corporations, in t
tered fortunes of their failing pri
rights of others. To the same effec
tions,[178] where it is said: 'The dir
held liable for a nuisance created
gineer under a general authority
they were personally ignorant of the
though such plan was a departure
stood method, which the directors
been discontinued.'" Again, the
thropic work of a religious associa
house used as a night refuge for th

176. Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 5 Am. Neg. Rep. 647, 44 L. R. A. 508, 10 Am. & Eng. Corp. Cas. N. S. 451, 56 Pac. 358, 74 Am. St. Rep. 602-n.

ders to the caretakers of such house as to the admission of destitute persons at night, may, in the event of the building being so over-crowded as to be a nuisance with the English Public Health Act, 1891, be summoned as the person by whose act, default or sufferance the nuisance has arisen.[179] So non-execution of the duty of directors, which results in the positive act of the creation and maintenance of a continuing nuisance by the corporation, on account of which a third person is killed, amounts, unless explained, to a misfeasance on their part, or, if they have actual knowledge of and authorize the nuisance, to malfeasance, and is not merely a non-feasance for which the liability can be limited to the corporations only.[180] But, although where one participates in the obstruction of a public road, it is immaterial whether or not he knew that the road was legally established, still where there is no proof whatever of any personal direction, management or participation, in the acts charged other than what may be inferred from the office of one who is president of the corporation, and he has no personal knowledge of or part in the obstruction of the public highway by the corporation, he is not liable under a statutory provision for wilfully obstructing the road.[181] So a director who knows nothing of a nuisance and who could not, by exercising ordinary diligence in control, have known of it, or, generally speaking, one who considering the situation and all the attendant circumstances, has performed his duty of taking care, is not personally liable for the nuisance and cannot be held so.[182] Again, "though a corporation is indictable for a particular wrong, still the individual members and officers who participate in it may be also liable for the same act. But they are not so liable in all cases in which the corporation is."[183] And the incorporators of a railroad company and stockholders therein are not individually liable

179. Reg. v. Mead, 64 L. J. M. C. N. S. 169.

180. Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 56 Pac. 358, 5 Am. Neg. Rep. 647, 44 L. R. A. 508, 10 Am. & Eng. Corp. Cas. N. S. 451, 74 Am. St. Rep. 602-n.

181. State v. White, 96 Mo. App. 100, 69 S. W. 684. Under Rev. Stat. 1899, § 9454.

182. Cameron v. Kenyon-Connell Commercial Co., 22 Mont. 312, 44 L. R. A. 508, 56 Pac. 358, 10 Am. & Eng. Corp. Cas. N. S. 451, 5 Am. Neg. Rep. 647, 74 Am. St. Rep. 602-n.

183. Bishop's New Crim. Law (8th Ed.), § 424.

for the maintenance of a continuous nuisance by the corporation upon the premises of another. It is a good defense that the tortious act was committed by another.[184]

§ 453. **Liability of owner generally—Instances.**—It is the common law duty of the owner of a vacant piece of land in a city to prevent it from being so used as to become and continue a public nuisance.[185] And an abutting owner may be liable for maintaining a defective fence where a physical injury is occasioned by such nuisance.[186] But he is held not liable for injuries to animals occasioned by a fence not a nuisance *per se*.[187] And the fact that he is under no obligation to fence may prevent a recovery for loss of his neighbor's cattle occasioned by eating leaves of a yew tree wholly upon such owner's land.[188] So an owner may under a statute be liable for the cost of removing filth or its sources, even though the property is occupied by a tenant.[189] And in a similar case an agent in control has been held an owner within the terms of a city charter.[190] Again, where the nuisance consists of a cow stable the owner should be prosecuted therefor, instead of for non-compliance with an ordinance of the board of health unlawfully restricting the method of construction of floors.[191] And the owner of a tower, which constitutes a private nuisance by reason of accumulations thereon of ice and snow at certain seasons, and the consequent danger to property and life, is held liable therefor.[192] So one's claimed title may constitute such ownership or control that he will be a proper party defendant.[193] And it is

184. Dieter v. Estill, 95 Ga. 370, 22 S. E. 622.

185. Attorney-Gen'l v. Tod Heatley, 66 L. J. Ch. N. S. 275, 76 Law T. Rep. 174 (1897), 1 Ch. 560, rev'g 75 Law T. Rep. 452.

186. Harrold v. Watney (C. A.), (1898) 2 Q. B. 320, 78 Law T. Rep. 788, 67 L. J. Q. B. N. S. 771.

187. Presnall v. Raley (Tex. Civ. App.), 27 S. W. 200.

188. Ponting v. Noakes (1894), 2 Q. B. 281.

189. Bangor v. Rowe, 57 Me. 436.

190. St. Paul v. Clark, 84 Minn. 138, 86 N. W. 993.

191. State, Morford v. Asbury Park Board of Health, 61 N. J. L. 386, 39 Atl. 706.

192. Davis v. Niagara Falls Tower Co., 49 N. Y. Supp. 554, 25 N. Y. App. Div. 321.

193. Eastman v. St. Anthony Falls Water Power Co., 12 Minn. 137.

held that any one of the joint owners of adjacent lands may be sued.[194] But it is decided that it is not necessary in an equitable suit to join the owner in fee, where the claimed nuisance is movable property on his land, but in the possession of a tenant.[195] And where grantors of lots have sold them with an easement in sewers in streets laid out by them, but over which they retained no control, they are not liable for a nuisance created by their grantees in connecting their premises with such sewers.[196] So a grantor, under covenant to erect no nuisance on adjoining land is not liable where the covenant is broken by his subsequent grantee of the servient tenement, nor is his grantee liable.[197]

§ 454. **Liability of erector of nuisance and subsequent holders by purchase or descent—Continuance of nuisance.**—If one erects a nuisance, even though he is not owner of the freehold or any part of it, he is held liable notwithstanding he subsequently disposes of his interest in the erection constituting the nuisance, and the right of action for damages against him is not thereby defeated.[198] So a party erecting a mill-dam on his own land, which causes an overflow on the land of another, is not exonerated, by conveying the land and dam to a third person, from responsibility for damages arising from such flowage, after such conveyance, and he who erects a nuisance does not by conveying to another transfer the liability for the erection to the grantee.[199] And in another case it is declared that it is the rule that one who erects a nuisance on land is liable for the continuance of it as well as for the original wrong, though he has demised the premises to another with the nuisance upon it and reserved a rent.[200] So where the plaintiff transfers his title to property damaged by a nuisance the action

194. Sanders v. Riedinger, 43 N. Y. Supp. 127, 19 Misc. 289.

195. Olmstead v. Rich, 6 N. Y. Supp. 826, 53 Hun, 638.

196. Moore v. Langdon, 2 Mackey (D. C.), 127, 47 Am. Rep. 202.

197. Clark v. Devoe, 48 Hun (N. Y.), 512, 16 N. Y. St. R. 264, 1 N. Y. Supp. 132, 28 W. D. 547, aff'd 124 N. Y. 120, 35 N. Y. St. R. 206, 26 N. E. 275.

198. Dorman v. Ames, 12 Minn. 451.

199. Eastman v. Amoskeag Mfg. Co., 44 N. H. 143.

200. Fish v. Dodge, 4 Denio (N. Y.), 311, 317, 47 Am. Dec. 254, per Bronson, Ch. J.

does not abate.[201] In New Jersey if the erector of a nuisance covenants in his deed for quiet enjoyment and the right to maintain the nuisance he affirms its continuance and is liable therefor.[202] So under a New York decision if one erect a nuisance on his own land, to the injury of the land of another, and then conveys the premises to a purchaser with warranty, he nevertheless remains liable, in an action on the case, for the damages occasioned by the continuance of the nuisance subsequent to the conveyance. And this rule applies to one who has erected the nuisance and then conveyed and surrendered the possession of the premises to another with covenants of warranty for quiet enjoyment; and the court considered these covenants as strong and clear affirmance of the nuisance in the possession and enjoyment of his grantee.[203] This case examines and limits that of Blunt v. Aikin,[204] which holds that the action must be against the one in possession. It appeared that the plaintiff had no interest in the premises injured by the nuisance until some time after defendant had been out of the possession of the nuisance itself; but the court declared that if "the receipt of the rent is a sufficient affirmation of the nuisance and participation in its continuance to make him liable to anyone, he might be liable to the person injured, either by the original erection of the nuisance or by the continuance of it." Both the Blunt case and the one in which it is limited are quoted or cited to the points that a party who has erected a nuisance will sometimes be answerable for its continuance after he has parted with the possession of the land; but that it is only so where he continues to derive a benefit from the nuisance, as by demising the premises and receiving rent, or where he conveys the property with covenants for the continuance of the nuisance.[205] Again, defendant cannot be held liable for damages for the operation by its predecessors in interest of works causing the alleged nuisance; that is, de-

201. Standard Bag & Paper Co. v. Cleveland, 25 Ohio Cir. Ct. R. 380.

202. East Jersey Water Co. v. Bigelow, 60 N. J. L. 201, 38 Atl. 631.

203. Waggoner v. Jermaine, 3 Denio (N. Y.), 306.

204. 15 Wend. (N. Y.), 522.

205. Covert v. Cranford, 141 N. Y. 521, 526, 36 N. E. 597, 57 N. Y. St. R. 720, rev'g 50 N. Y. St. R. 516, 21 N. Y. Supp. 219; Mayor of Albany v. Cunliff, 2 N. Y. 165, 174, per Bronson, J.; Hanse v. Cowing, 1 Lans. (N. Y.) 288, 293.

fendant will not be liable prior to the day when he became owner.[206] And there must be some act showing some relation to or connection with a public nuisance by owners by descent to render them liable.[207]

§ 455. **Same subject—Notice or request to abate—Creator or maintainer of nuisance.**—It is not necessary that notice be given to the erector or creator of a nuisance or that he be requested to abate the same before action is brought:[208] although it is held that, except in cases of nuisances *per se*, a nuisance cannot be summarily abated by a municipality except upon notice and an opportunity to be heard.[209] And where a statute and ordinance requires notice it is a prerequisite.[210] But where the plaintiff purchased his mill

206. Watson v. Colusa-Parrot Min. & Smelting Co. (Mont., 1905), 79 Pac. 14. See Meyer v. Harris, 61 N. J. L. 83, 38 Atl. 690.

207. Bruce v. State, 87 Ind. 450.

208. Middlebrooks v. Mayne, 96 Ga. 449, 23 S. E. 398; Ray v. Sellers, 1 Duv. (62 Ky.) 254; Dunsbach v. Hollister, 49 Hun, 352, 17 N. Y. St. R. 461, 2 N. Y. Supp. 94, aff'd 132 N. Y. 602, 44 N. Y. St. R. 934, 30 N. E. 1152. See Wabash R. Co. v. Sanders, 58 Ill. App. 213.

209. Western & A. R. Co. v. Atlanta, 113 Ga. 537, 38 S. E. 996, 54 L. R. A. 294.

That no notice necessary where city ordinance violated, see Miller v. Sergeant (Ind. App.), 37 N. E. 418.

210. Shannon v. Omaha (Neb.), 100 N. W. 298.

When sufficient service of notice by health commissioner not shown by return. See St. Louis v. Flynn, 128 Mo. 413, 31 S. W. 17.

Constable who is member of board of health may serve notice or order to remove nuisance. Commonwealth v. Alden, 143 Mass. 113, 3 N. E. 211, 9 N. E. 15.

Rent collector is not agent of premises on whom notice may properly be served, under charter, c. 10, § 10, of St. Paul city, and no presumption exists that he has authority to abate nuisance. St. Paul City v. Clark, 84 Minn. 138, 86 N. W. 1093.

Under English Public Health (London) Act, 1891, service of notice is not condition precedent to jurisdiction of petty sessional court, under § 21, as to offensive trades, as service of such notice by the sanitary authority, to abate nuisance liable to be dealt with summarily has reference only to nuisances specified under § 2 of said Act. Bird v. St. Mary Abbotts, 64 L. J. M. C. N. S. 215 (1895), 1 Q. B. 912.

When notice of action or suit condition precedent to jurisdiction. See Danner v. Kotz, 74 Iowa, 389, 37 N. W. 969; Hughes v. Eckerson, 55 Iowa, 641, 8 N. W. 484, Miller's Code, § 3391; Bemis v. Clark, 11 Pick. (Mass) 452.

after the erection of the defendant's dam, it is held that he purchased the property with the inconvenience, and that before he could bring suit therefor, he was bound to give notice to the defendant of the injury complained of; and evidence that the plaintiff, before suit, told the defendant to keep the water from his dam out of the plaintiff's field, and that defendant promised to do so, is not legally sufficient for the purpose of proving the notice requisite for such suit.[211] The vendee of land, however, after a special request to remove a nuisance, which had been erected before he purchased, may maintain an action for continuing it.[212]

§ 456. **Notice or request to abate, continued—Grantee, etc., of erector of nuisance.**—A different rule from that which governs notice to an erector of a nuisance prevails, however, as to a subsequent holder by purchase or descent, and where such party did not create an existing nuisance or the source thereof, but it was created prior to the time he acquired his title or interest, notice, or a request or demand to reform, abate or remove it, must be given him, and it is a prerequisite or condition precedent to maintaining an action against him to abate, or for damages.[213] So in New York a

211. Pickett v. Condon, 18 Md. 433. See, also, Eastman v. Amoskeag Mfg. Co., 44 N. H. 143. Examine Castle v. Smith (Cal.), 36 Pac. 859.

212. Loftin v. M'Lemore, 1 Stew. (Ala.), 133.

213. Philadelphia & R. R. Co. v. Smith, 12 C. C. A. 384, 64 Fed. 679, 27 L. R. A. 131, 28 U. S. App. 134 (lessee); Central Trust Co. v. Wabash, St. L. & P. R. Co., 57 Fed. 441; Commelin v. Coxe, 30 Ala. 318, 68 Am. Dec. 120; Middlebrooks v. Mayne, 96 Ga. 449, 23 S. E. 398; Wegner v. Meyer, 95 Ill. App. 68; London v. Mullins, 52 Ill. App. 410; Rouse v. Chicago & E. I. R. Co., 42 Ill. App. 421; Groff v. Ankenbrandt, 19 Ill. App. 148, aff'd 124 Ill. 51, 7 Am. St. Rep. 342, 15 N. E. 40; Fenter v. Toledo St. L. & K. C. R. Co., 29 Ill. App. 250; Staples v. Dickson, 88 Me. 362, 34 Atl. 168; Sloggy v. Dilworth, 38 Minn. 179, 8 Am. St. Rep. 656, 36 N. W. 451; Bartlett v. Simon, 24 Minn. 448; Pinney v. Berry, 61 Mo. 359; Snow v. Cowles, 2 Fost. (N. H.) 296; Carleton v. Redington, 1 Fost. (N. H.) 291; Beavers v. Trimmer, 25 N. J. L. 97; Pierson v. Glean, 14 N. J. L. 36, 25 Am. Dec. 497; Slight v. Gutzlaff, 35 Wis. 675, 17 Am. Rep. 476.

The rule is well established that a person not the original creator of a nuisance is entitled to notice that it is a nuisance, and request must be made that it may be abated before an action will lie for that purpose.

grantee or devisee of premises upon which there is a nuisance at the time the title passes is not responsible therefor until he has had notice thereof.[214] But it is also held in that State that it is not necessary to prove a request to abate the nuisance as such request is unnecessary.[215] The rule that knowledge or notice of and request to abate a nuisance is necessary applies to a borough succeed-

Grigsby v. Clear Lake Water Co., 40 Cal. 346, 407.

Demand to abate not necessary to action for damages under § 3483 Civ. Code, even where nuisance created by predecessor in interest. Coats v. Atchison, Topeka & Santa Fe Ry. Co. (Cal.), 82 Pac. 640.

Alienee is responsible for continuance of nuisance either to a party originally affected by it or another deriving title from him, but he does not become responsible unless after reasonable notice, request or remonstrances, he refuses to reform or abate the nuisance. West & Brother v. Louisville, Cincinnati & Lexington R. Co., 8 Bush (Ky.) 404.

Where a lessee or grantee continues a nuisance of a nature not essentially unlawful, erected by his lessor or grantor, he is liable to an action for it only after notice to reform or abate it. The rule is very generally recognized in this country. Slight v. Gutzlaff, 35 Wis. 675, 17 Am. Rep. 476.

Grantee of erecter of nuisance bound by notice to latter. See Caldwell v. Gale, 11 Minn. 77.

Lessee who has sublet must have notice or knowledge or should have known of existence of nuisance. Timlin v. Standard Oil Co., 126 N. Y. 514, 37 N. Y. St. R. 906, 27 N. E. 786, rev'g 54 Hun, 44, 26 N. Y. St. R. 42, 7 N. Y. Supp. 158.

214. Ahern v. Steele, 115 N. Y. 203, 26 N. Y. St. R. 295, 22 N. E. 193, 40 Alb. L. J. 424, 12 Am. St. Rep. 778, 5 L. R. A. 449, rev'g 48 Hun, 517, 16 N. Y. St. R. 24, 1 N. Y. Supp. 259; Timlin v. Standard Oil Co., 126 N. Y. 514, 37 N. Y. St. R. 906, 27 N. E. 786, rev'g 54 Hun, 44, 26 N. Y. St. R. 42, 7 N. Y. Supp. 158; Schreiber v. Driving Club, 39 N. Y. Supp. 348, 17 Misc. 131, rev'g 15 Misc. 632, 72 N. Y. St. R. 701, 37 N. Y. Supp. 348; Orvis v. Elmira, C. & N. R. Co., 17 N. Y. App. Div. 187, 45 N. Y. Supp. 367.

215. In order to maintain an action for damages resulting from a nuisance upon defendant's land, where such nuisance was erected by a previous owner before conveyance to defendant, it is necessary to show that before the commencement of the action he had notice or knowledge of the existence of the nuisance, but it is not necessary to prove a request to abate it. Conhocton Stone Road v. Buffalo, N. Y. & Erie Ry. Co., 51 N. Y. 573, rev'g 52 Barb. 390, cited in Ahern v. Steele, 115 N. Y. 203, 224, 26 N. Y. St. R. 295. See Ray v. Sellers, 1 Duv. (Ky.) 254; Pinney v. Berry, 61 Mo. 359; Morris Canal & Bkg. Co. v. Ryerson, 27 N. J. L. 457; Haggerty v. Thompson, 45 Hun, 398, 10 N. Y. St. R. 137.

ing a town in the ownership and control of highways the same as to any other party who succeeds to ownership of premises which contain a nuisance.[216] So a purchaser of a dam may lawfully use it as it was when purchased and had been customarily used by his grantor until he is notified that such use is an encroachment upon the rights of others.[217] And where a bridge is not necessarily a nuisance a purchaser is entitled to notice of its defective character, it being erected at the time of purchase, to render him liable to damages to a landowner injured by overflow of water.[218] Again, where defendants have taken title subject to a valid outstanding lease which contaned no covenant binding the landlord to repair, they are not responsible for a nuisance of which they had no notice, created because of failure to repair during the existence of the precedent estate.[219] But where a highway or navigable waters are obstructed the rule is held not to apply as against the injured party.[220]

§ 457. **Notice or request to abate, continued.**—Although a lessee with actual notice, or other person not the creator of a nuisance, may be liable if he has knowledge of its existence, and continues it,[221] still it is also held that knowledge of the existence of a nuisance is not equivalent to a request to abate.[222] And one's knowl-

216. Morse v. Fair Haven East, 48 Conn. 220, 223.

217. Noyes v. Stillman, 24 Conn. 15. See, also, Occum Co. v. Sprague Mfg. Co., 34 Conn. 529.

218. Peoria & Pekin Union Ry. Co. v. Barton, 38 Ill. App. 469.

219. Ahern v. Steele, 115 N. Y. 203, 26 N. Y. St. R. 295, 22 N. E. 193, 5 L. R. A. 449, 40 Alb. L. J. 424, 12 Am. St. Rep. 778, rev'g 48 Hun, 517, 16 N. Y. St. R. 24, 1 N. Y. Supp. 259.

220. Arpin v. Bowman, 83 Wis. 54, 53 N. W. 151.

221. Missouri P. R. Co. v. Webster, 3 Kan. App. 106, 42 Pac. 845.

222. Missouri P. R. Co. v. Webster, 3 Kan. App. 106, 42 Pac. 845. See Crommelin v. Coxe, 30 Ala. 318, 41 Am. Dec. 744; Willetts v. Chicago B. & K. C. R. Co., 88 Iowa 281, 55 N. W. 313, 21 L. R. A. 608; Pinney v. Berry, 61 Mo. 359; Conhocton Stone Road v. Buffalo N. Y. & Erie Ry. Co., 51 N. Y. 573, 10 Am. Rep. 646, rev'g 52 Barb. 390.

Notwithstanding the predecessor in an easement or estate creates a nuisance, the successor, if he has knowledge of it, will be liable for a continuation thereof. Hulett v. Missouri, Kansas, & Tex. Ry. Co., 80 Mo. App. 87, 90, 2 Mo. App. Repr. 527.

223. West & Brother v. Louisville, Cincinnati & Lexington R. Co., 8 Bush (Ky.) 404.

edge must be of such a character as to charge him with notice that a nuisance exists.[224] But the acts of such subsequent holder of the title or interest in relation to the nuisance, may preclude the necessity of a notice, as where he changes the nature or structure of the nuisance so as to increase it;[225] or where he created,[226] or aided in creating it;[227] or actively continues, uses or maintains it,[228] after notice or demand.[229] And this rule applies to a contractor who fails to make proper and reasonable efforts to reform or abate the nuisance, although he would be entitled to notice where the character of the work is not in itself such that he, as a prudent man, would be led to believe would create a nuisance.[230] Nor is notice necessary where the character of the nuisance is such,[231] coupled with the length of time the party in possession has held his interest, as to have enabled him to have ascertained its existence.[232] So where the purchaser continues the nuisance, such as a defective cesspool and closet, a request to abate is not necessary, especially where there is no evidence of the existence of the nuisance prior to the passing of title.[233]

224. Schreiber v. Driving Club, 39 N. Y. Supp. 348, 17 Misc. 131, rev'g 72 N. Y. St. Ry. 701, 37 N. Y. Supp. 348. See Nichols v. Boston, 98 Mass. 39, 93 Am. Dec. 132.

225. Middlebrooks v. Mayne, 96 Ga. 449, 23 S. E. 398; Fenter v. Toledo, St. L. & K. C. R. Co., 29 Ill. App. 250; Staples v. Dickson, 88 Me. 362, 34 Atl. 168.

226. City of Valparaiso v. Bozarth, 153 Ind. 536, 55 N. E. 439.

227. Steinke v. Bentley, 6 Ind. App. 663, 34 N. E. 97.

228. Whiteneck v. Philadelphia & R. R. Co., 57 Fed. 901. See Drake v. Chicago, R. I. & P. R. Co., 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215; Pillsbury v. Moore, 44 Me. 154, 69 Am. Dec. 91; Grogan v. Broadway Foundry Co., 87 Mo. 321; Hulett v. Missouri K. & T. R. Co., 80 Mo. App. 87, 2 Mo. App. Repr. 527; Meyer v. Harris, 61 N. J. L. 83, 38 Atl. 690; Brown v. Cayuga & S. R. R. Co., 12 N. Y. 486; Hubbard v. Russell, 24 Barb. (N. Y.) 404.

229. Ferman v. Lombard Invest. Co., 56 Minn. 166, 57 N. W. 309; George v. Wabash R. Co., 40 Mo. App. 433; Townes v. Augusta, 52 S. C. 396, 29 S. E. 851; Brown v. Cayuga & S. R. Co., 12 N. Y. 486; Chandler Electric Co. v. Fuller, 21 Can. S. C. 337.

230. James v. McMinimy, 14 Ky. L. Rep. 486, 20 S. W. 435.

231. Irvine v. Wood, 51 N. Y. 224, 10 Am. Rep. 603.

232. Timlin v. Standard Oil Co., 126 N. Y. 514, 37 N. Y. St. R. 906, 27 N. E. 786, rev'g 54 Hun, 44, 26 N. Y. St. R. 42, 7 N. Y. Supp. 158.

233. Finkelstein v. Huner, 179 N. Y. 548, 71 N. E. 1130, aff'g 77 N. J. App. Div. 424, 79 N. Y. Supp. 334.

§ 458. **Same subject.**—Merely making repairs upon the erection, which do not make it more of a nuisance, does not preclude the necessity of giving notice.[234] Nor, it is held, does the operation of a lessee railroad over an embankment, which obstructs the channel of a watercourse, render it liable where it has no knowledge that it is a nuisance.[235] And although it is held that there must be a notice in unequivocal terms,[236] yet the form of the notice is immaterial,[237] provided the alienee or grantee be apprized of the existence of the nuisance, the reasons or grounds for the alleged injury, and the desire that it be reformed, abated or removed. And a mere demand for the removal, actually and properly brought to such party's knowledge, or facts showing that actual information was received by him may be the equivalent of a notice to the extent that further notice is unnecessary.[238] So it is held sufficient to notify the officers of a lessee company.[239] Again, it is held that although the general rule is that one who purchases a nuisance or that which contributes thereto is not liable for damages for its continuance, without allegation and proof of notice to him of the existence of the nuisance and of the damage accruing therefrom; nevertheless this rule does not apply where the code provides that every successive owner of property, who neglects to abate a continuing nuisance upon, or, in the use of, such property, created by a former owner, is liable therefor in the same manner as the one who first created it.[240] The right of a purchaser of a nuisance to a notice may, however, be waived.[241]

234. Castle v. Smith (Cal.), 36 Pac. 859. See Philadelphia & R. R. Co. v. Smith, 64 Fed. 679, 12 C. C. A. 384, 28 U. S. App. 134, 27 L. R. A. 131.

235. Missouri P. R. Co. v. Webster, 3 Kan. App. 106, 42 Pac. 845.

236. McDonough v. Gilman, 3 Allen (Mass.) 264, 80 Am. Dec. 72.

237. Wabash R. Co. v. Sanders, 58 Ill. App. 213; Carleton v. Redington, 1 Fost. (N. H.) 291.

238. Cloverdale v. Smith, 128 Cal. 230, 60 Pac. 851; Central R. R. v. English, 73 Ga. 366; Hickey v. Michigan C. R. Co., 96 Mich. 498, 55 N. W. 989, 48 Alb. L. J. 268, 21 L. R. A. 729, 35 Am. St. Rep. 621; Snow v. Cowles, 6 Fost. (N. H.) 275.

239. Central R. R. v. English, 73 Ga. 366.

240. Watson v. Colusa Parrot Mining & Smelting Co. (Mont., 1905), 79 Pac. 14. Examine Coats v. Atchison, Topeka & Santa Fe Ry. Co., (Cal.), 82 Pac. 640. But see contra Castle v. Smith (Cal.), 36 Pac. 859, under § 3483 Cal. Civ. Code.

241. Bartlett v. Siman, 24 Minn.

§ 459. **Liability for continuing nuisance—Statute of limitations—Rulings and instances.**—In Alabama it is held that an action on the case lies against him who erects a nuisance, and, notwithstanding a recovery for its erection, it may afterwards be maintained against him for the continuance though he has made a lease of it to another, as he has transferred it with the original wrong and his demise affirms the continuance of it. He has also rents for a consideration and, therefore, ought to answer the damage it occasions.[242] Under an Arkansas decision, where a nuisance is of a permanent character and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened, and there may be as many successive recoveries as there are successive injuries. In such case the statute of limitations begins to run from the happening of the particular injury complained of.[243] In Georgia, where a person persists in maintaining a nuisance which is not permanent in its character, but which can and should be abated, every continuance of the nuisance is a fresh nuisance for which a new action will lie. A suit against one who maintains a nuisance of such a character for damages done to the land of the plaintiff from a named date to the filing of a petition, is no bar to a fresh action for damages, since done to the same land by the maintenance of the same nuisance.[244] But in that State a sewer nuisance is not such a continuing one as to sustain a suit for damages brought more than four years after the work was done; and such a case is not within a constitutional provision that compensation shall be made where private property is damaged for public use.[245] In Illinois an action may be maintained for the creation of a nuisance, and a subsequent action may be maintained for its continuance. The continuance of that which was originally a nuisance is regarded as a new nuisance, and although a recovery may be barred upon the original cause, an action

448. See Brown v. Cayuga & S. R. Co., 12 N. Y. 486.

242. Grady v. Wolsner, 46 Ala. 381, 7 Am. Rep. 593.

243. St. Louis Iron Mountain & S. R. Co. v. Biggs, 52 Ark. 240, 6 L. R. A. 804, 12 S. W. 331.

244. Southern Ry. Co. v. Cooke, 117 Ga. 286, 43 S. E. 697.

245. Atkinson v. Atlanta, 81 Ga. 625, 7 S. E. 692.

on the case may be brought at any time before an action is barred, to recover such damages as have accrued, by reason of its continuance within the statutory period.[246] A nuisance which may be abated by law is not regarded as a permanent source of injury, but as a continuing nuisance. Successive actions for damages occasioned by it may be maintained from time to time as such damages are inflicted.[247] And where the damages are not so permanent and certain in their character as to enable the jury to give compensation at once for the entire injury, but the nuisance is in its nature a continuing one, in such case successive actions may be brought and sustained as long as such nuisance is maintained.[248] Under an Indiana decision, one who erects a nuisance is liable for a continuance, as for a new nuisance, as long as it continues, and it is not in his power to release himself therefrom by granting it over to another.[249] In an Iowa case it is held that a liquor nuisance shown to recently exist, will be presumed to continue, in the absence of evidence to the contrary, so that actual sales need not be shown up to commencement of an action to enjoin.[250] Under a Maine decision, a recovery of damages for the erection of a building, or other structure, upon another's land, does not operate as a purchase of the right to have it remain there; and successive actions may be brought for its continuance, until the wrongdoer is compelled to remove it.[251] In Maryland, it is held that in order to constitute a continuance of a nuisance erected by another there must be some active participation in the continuance of it or some positive act evidencing its adoption.[252] Under a Massachusetts case, an action on the case lies against him who erects a nuisance, and against him who continues a nuisance erected by another, and the continuance, and every use of that which is in its erection and

246. Chicago, Burlington & Quincey R. Co. v. Schaffer, 124 Ill. 112, 121, 16 N. E. 239, 14 West. Rep. 139 per Magruder, J.

247. Baker v. Leka, 48 Ill. App. 353, citing 16 Am. & Eng. Ency., 986 (1st ed.).

248. Mellor v. Pilgrim, 3 Ill. App. 476.

249. Jordan v. Helwig, 1 Wils. (Ind.) 447. See Helwig v. Jordan, 53 Ind. 21, 21 Am. Rep. 189.

250. McCoy v. Clark (Iowa), 81 N. W. 159.

251. Cumberland & Oxford Canal Corp. v. Hitchings, 65 Me. 140, per Walton, J.

252. Walter v. County Commissioners of Wicomico Co., 35 Md. 385.

use a nuisance, is a new nuisance, for which the party injured has his remedy in damages. And although, after judgment, and damages recoverd, in an action for erecting a nuisance another action is not to be maintained for the erection, yet another action will lie for the continuance of the same nuisance.[253] In Minnesota it is decided that a recovery for a nuisance does not bar a subsequent recovery for its continuance;[254] and that where land is injured through the erection and maintenance of a nuisance by an adjoining owner upon his lands, the latter is liable to successive actions for damages. He cannot release himself from such liability by a conveyance of the premises. So every continuance of a nuisance, or recurrence of the injury, is also an additional nuisance forming in itself the subject matter of a new action.[255]

§ 460. **Same subject.**—In Missouri a nuisance, by collecting surface waters into artificial channels and casting them in a body upon a neighboring proprietor, whether by an individual or municipal corporation, if continued becomes a fresh nuisance every day, and authorizes new suits accordingly.[256] Under a Nebraska decision, if a railway bridge is a nuisance and an unlawful obstruction in a river, then every continuance of such nuisance is a new nuisance, for which, when damages have been sustained, an action may be maintained, the recovery being limited to such damages as have accrued before the action was brought, and when damages result from a continuing nuisance a recovery may be had for each injury as it occurs.[257] In New York whoever continues and adopts a nuisance is as responsible for an injury caused thereby as if he had constructed it.[258] And it is held that where one is maintaining a nuisance and polluting a stream, flowing through his land, with

253. Staple v. Spring, 10 Mass. 72, 73, 74, per Sewall, J.

254. Byrne v. Minneapolis & St. L. R. Co., 38 Minn. 212, 36 N. W. 339.

255. Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656.

256. Paddock v. Somes, 102 Mo. 226, 237, 10 L. R. A. 254, 14 S. W. 746.

257. Omaha & Republican Valley R. Co. v. Standen, 22 Neb. 343, 35 N. W. 183.

258. Dukes v. Eastern Distilling Co., 51 Hun, 605, 22 N. Y. St. R. 833. Compare as to the principal point in the case Neff v. New York Central & H. H. R. Co., 80 Hun, 394, 396, 62 N. Y. St. R. 833, 30 N. Y. Supp. 324.

sewage rendering such stream unfit f
prietor and materially damaging hir
stantly increasing and will be conti
strained by the court, a clear case e
an injunction.[259] It is also decidec
plained of is a continuing nuisance,
sewage or effluent into the waters o:
ducing foul and offensive odors and
waters, it is the duty of a court of e
injured.[260] So under another case in
may be maintained to enforce an ord
for the suppression and removal of
discharge upon town lands, by a ci
may restrain its continuance, and a c
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New Jersey decision the owner of pr
has been erected by his predecessor
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continue, it is well settled that they
injunction.[262] And so parties who ca
the land of a stranger, are liable fo
defense that they cannot lawfully en
out rendering themselves liable to a
land. And where plaintiff declare
mer recovery under a similar count
concluded from recovering for inj
tinuance of the nuisance; for to e

259. Sammons v. City of Glovers-
ville, 81 N. Y. App. Div. 332, 81 N.
Y. Supp. 466.

260. Butler v. Village of White
Plains, 59 N. Y. App. Div. 30, 33,
69 N. Y. Supp. 193.

recovery must be pleaded. To avoid an estoppel plaintiff must declare for a continuance of the nuisance.[264] But the nuisance may be no such continuing one as that equity will interfere to abate it, as where the nuisance or obstruction is one from which the party could by his own act have relieved himself. [265] It is held in a Tennessee case that a nuisance arising from the discharge of a city's sewerage near private property is a recurring one, and will sustain successive actions, where the plan for sewers adopted by the city contemplates the discharge of the sewage at another point, and its discharge at the point in question is apparently only temporary.[266] And under another decision in that State, if a railroad company uses a street for the operation of its road beyond what is necessary for the running of its trains, and by such excessive and improper use substantially destroys the easement of way and of ingress and egress appurtenant to an owner to an abutting lot, such railway company is liable to such abutting owner in successive actions for the nuisance, and damages are recoverable up to the time each action was brought. Nor will the recovery in one action bar a subsequent one brought for the continuance of such wrongs.[267] So under a Washington case the court has jurisdiction to enjoin a continuing nuisance such as a house of ill-fame, although a public nuisance, where it renders plaintiff's property unfit for residence purposes, and it is immaterial that plaintiff purchased his property after the commencement of the nuisance, as the right of action in favor of plaintiff's grantors runs with the land and also is a continuing offense, and lapse of time bars recovery for a completed offense.[268] In Wisconsin it is held that, where the statute so permits, an equitable action may be maintained to restrain defendant from discharging upon plaintiffs land, through a ditch, surface waters collected into a basin by defendant, where the injury is continuous and constantly recurring.[269] And

264. Smith v. Elliott, 9 Pa. 345.

265. Barclay's Appeal, 93 Pa. 50, 55.

266. Chattanooga v. Dowling, 101 Tenn. 342, 47 S. W. 700.

267. Harmon v. Louisville N. O. & T. R. Co., 87 Tenn. 614, 11 S. W. 703.

268. Ingersoll v. Rousseau, 35 Wash. 72, 76 Pac. 513.

269. Wendlandt v. Cavanaugh, 85 Wis. 256, 55 N. W. 408, Wis. Laws 1882, chap. 190 amdg. Rev. Stat. § 3180 (G. & B. Ann. Stats.)

when a building is erected for a use which works a nuisance, the nuisance is created, and continues till the use is abandoned. It remains a continuing nuisance though the use may be, in its ordinary course or by accident, suspended at times, until it be so suspended as to operate as an abandonment so where lime-kiln is once erected and used, its subsequent use in the course of business, if a nuisance, is a continuing one. Each successive burning of lime is not an original nuisance.[270] Under a Federal case if the cause of annoyance and discomfort be continuous equity will restrain it.[271]

§ 461. **Liability—Landlord and tenant—Distinction to be observed.**—A distinction exists between the liability of a landlord to one of his tenants for letting defective premises with concealed dangers, or between a case where the accident arises from a defect known by the tenant but not a nuisance, and the case of a nuisance which the landlord should abate, and concerning which he owes the duty of care and is liable for his negligence to all to whom he owes such duty; and if a landlord lets a tenement in a defective condition he is not liable to a stranger injured by the defect unless it amounts to a nuisance.[272] So it is declared that in order to charge the landlord the nuisance must necessarily result from the ordinary use of the premises by the tenant or for the purpose for which they were let; and where the ill results flow from the improper or negligent use of the premises by the tenant, or, in other words, where the use of the premises may or may not become a nuisance, according as the tenant exercises reasonable care or uses the premises negligently, the tenant alone is chargeable for the damages arising therefrom.[273]

270. Slight v. Gutzlaff, 35 Wis. 675, 17 Am. Rep. 476.

271. Baltimore, etc., R. Co. v. Fifth Baptist Church, 108 U. S. 317, 329.

272. Brady v. Klein, 133 Mich. 422, 95 N. W. 557, 14 Am. Neg. Rep. 351.

273. Langabaugh v. Anderson, 68 Ohio St. 131, 14 Am. Neg. Rep. 170, 181, 67 N. E. 286, quoting from Wood on Landlord and Tenant (2nd Ed.) § 536.

§ 462. **When owner or landlord liable to third persons.—Rules and instances.**—When the owner leases premises which are a nuisance, or must in the nature of things become so by their user, and receives rent, then, whether in or out of the premises, he is liable.[274] And where a landowner erects or creates a nuisance on his land he cannot rid himself of liability occasioned by a demise of the property to another. Before the assignment he was liable and he cannot discharge himself by granting it over, especially where he reserves rent which recompenses him for a continuance of the nuisance and affirms the same.[275] So in New York it is declared that: "The owner is responsible if he creates a nuisance and maintains it; if he creates a nuisance and then demises the land with the nuisance thereon, although he is out of occupation; if the nuisance was erected on the land by a prior owner, or by a stranger, and he knowingly maintains it; if he has demised premises and covenanted to keep them in repair, and omits to repair and thus they become a nuisance; if he demises premises to be used as a nuisance or for a business, or in a way that will necessarily become a nuisance."[276] So one who demises premises for carrying on a business necessarily injurious to the adjoining proprietors is liable as the author of the nuisance.[277] And in an action to recover damages for a nuisance caused by the erection of a barn or stable upon the defendants land adjoining the plaintiffs dwelling house and allowing manure and filthy water to accumulate and stand in the cellar thereof, it is not erroneous for the judge to charge the jury that if the defendant constructed and adapted the barn so that in its ordinary use it would be injurious and offensive to the plaintiff, and cast unwholesome odors into his house, the defendant is liable for the nuisance thus caused by the tenants to

274. Metropolitan Savings Bk. v. Marion, 87 Md. 68, 69, 39 Atl. 90. Citing and quoting from Maenner v. Carroll, 46 Md. 216, per Alvey, J.; Owing v. Jones, 9 Md. 117, per Le Grand, Ch. J.

275. Terminal Co. v. Jones, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188.

276. Ahern v. Steele, 115 N. Y. 203, 209, 26 N. Y. St. R. 295, 22 N. E. 193, 5 L. R. A. 449, 40 Alb. L. J. 424, 12 Am. St. Rep. 778, per Earl, J., rev'g 48 Hun, 517, 16 N. Y. St. R. 24.

Liability of Landlord to third person for nuisances. See note 26 L. R. A. 197.

277. Fish v. Dodge, 4 Denio (N. Y.) 311, 317, 47 Am. Dec. 254.

whom he had let the barn. So where a barn is built to be used in a certain way and its use in that way would necessarily under ordinary circumstances be a nuisance if it is let to a tenant who in fact uses it in that way and such use proves noxious or injurious to adjoining occupants the owner is liable for the injury.[278] Again, if a tenant creates a nuisance upon the premises during the term, by an unusual and extraordinary use thereof, the landlord becomes chargeable with its continuance where he renews the lease with the nuisance thereon, although he could not be held liable for the consequences in the first instance.[279] And the owner of adjoining land occupied by tenants is liable for a nuisance caused by privy pits, if the pits are so constructed that the constant use of them will necessarily result in the creation of a nuisance or in a continuing nuisance, or if they are permitted to remain in an unsanitary condition where there is power to remedy the grievance.[280] So where one owns land on which a kiln was erected by himself and his partners for partnership purposes, but sells out his interest to his partners and leases the real estate on which the kiln is situated and receives rent therefor, and the kiln when used is dangerous to the property of others, such owner must be held to have knowledge of its intended use and the danger therefrom to the property of others; so that, having retained title to the land and deriving an income from its use, including the kiln, he becomes liable to a third person for injury from the burning of the latters house occasioned by the use of said kiln.[281]

§ 463. **Same subject—Defective, dangerous, etc., condition of premises.**—When injuries result to a third person from the faulty or defective construction of the premises, or from their ruinous condition at the time of the demise, or because they then contain a nuisance, even if this only becomes active by the tenant's ordinary

278. Pickard v. Collins, 23 Barb. (N. Y.) 444.

279. Fleischner v. Citizens Real Est. & Invest. Co., 25 Oreg. 119, 128, 35 Pac. 174.

280. Park v. White (Ch.), 23 Ont. Rep. 611.

281. Helwig v. Jordan, 53 Ind. 21, 21 Am. Rep. 189, approving the principles of Jordan v. Helwig, 1 Wils. (Ind.) 447, but distinguishing that case.

use of the premises, the landlord is still liable notwithstanding the lease.[282] And if the premises rented are in such a dangerous condition as to constitute a nuisance at the time of the renting the lessor remains liable for the consequences of the nuisance, even though his lessee may also be liable, and if the premises are rented for a public use, for which he knows that they are unfit and dangerous, he is guilty of negligence and may become responsible to persons suffering injury while rightfully using them.[283] The owner of premises is also liable, by reason of the defective construction and dangerous condition of the premises, even though they are at the time in the possession of the tenant, if the defect existed when the owner leased the property; so that the landlord is held to be liable in an action by a board of health for a nuisance from waste water and faecal matter being allowed to run from defendants premises into the streets of a village.[284] So the owner of a building under his control and in his occupation is bound, as between himself and the public, to keep it in such a proper and safe condition, that travellers on the highway shall not suffer injury. It is the duty of the owner to guard against the danger to which the public is thus exposed, and he is liable for the consequences of having neglected to do so.[285] The landlord is also liable where the premises are so constructed or in such a condition that the continuance of their use by the tenant must result in a nuisance to a third person, and a nuisance does so result.[286] So a water pipe or conductor which throws water upon the walk, and freezes regularly in the winter season for several years and renders the walk dangerous to the public is a nuisance; and where the nuisance was there when the tenants took possession, the lessor is liable to third persons for

282. Felhauer v. City of St. Louis, 178 Mo. 635, 646, 77 S. W. 843, per Brace, P. J., quoting from Taylor's Landlord and Tenant (8th Ed.) § 174.

283. Barrett v. Lake Ontario Beach Imp. Co., 174 N. Y. 310, 314, 14 Am. Neg. Rep. 144, 146.

284. New Rochelle Board of Health v. Valentine, 11 N. Y. Supp. 112, 32 N. Y. St. R. 919.

285. Gray v. Boston Gas Light Co., 114 Mass. 149, 153, 19 Am. Rep. 324, per Endicott, J.

286. Isham v. Broderick, 89 Minn. 397, 95 N. W. 224, 14 Am. Neg. Rep. 112, 115, citing Brown v. White, 202 Pa. St. 297, 51 Atl. 962, 12 Am. Neg. Rep. 132.

injuries occasioned thereby, since he continues the nuisance by leasing premises then dangerous to the public.[287]

§ 464. **Lessor of structure or building for public entertainment liable.**—The lessors or owners of buildings or structures in which public exhibitions and entertainments are designed to be given and for admissions to which the lessors directly or indirectly receive compensation are subject to a different rule from that in the ordinary cases of leasing of buildings in that while there is in the latter no implied warranty on the part of the lessor that the buildings are fit and safe for the purposes for which they are used yet in the former case the lessors or owners of such buildings or structures hold out to the public that the structures are reasonably safe for the purposes for which they are let or used and impliedly undertake that due care has been exercised in their erection and such lessor having created an unsafe and dangerous structure and not having performed his duty in exercising the proper degree of care to know that it was safe he is liable to a person injured by reason of its being unsafe or of improper and faulty construction whereby it constitutes a nuisance.[288]

§ 465. **Liability of lessee who sublets.**—The same liability as to nuisances rests upon the lessees of a building as upon the owner, where such lessees sublet the premises and are chargeable with or have knowledge of the existence of a nuisance.[289]

§ 466. **When owner or landlord not liable to third persons—Rules and instances.**—It is a general rule that where the owners of the ground lease the building and the alleged nuisance is neither created nor maintained by them, but by the lessees, an action cannot be upheld against such owners, since no liability can attach to a lessor for a nuisance created or maintained on the premises

287. Isham v. Broderick, 89 Minn. 397, 95 N. W. 224, 14 Am. Neg. Rep. 112.

288. Fox v. Buffalo Park, 21 N. Y. App. Div. 321, 47 N. Y. Supp. 788, aff'd 163 N. Y. 559.

289. Timlin v. Standard Oil Co., 126 N. Y. 514, 37 N. Y. St. R. 906, 27 N. E. 786, rev'g 54 Hun, 44, 26 N. Y. St. R. 42, 7 N. Y. Supp. 158.

by a tenant.[290] Another general rule is that where property is not in itself a nuisance, or at the time of the demise is not a nuisance, but may or may not become such according to the manner of use by the tenant in possession, the landlord will not be liable for a nuisance created on the premises by the tenant.[291] And where a nuisance is created after the beginning of his tenancy by a tenant in possession, and there is nothing showing the nature of the tenancy, or whether the owner was to keep the premises in repair and it does not appear that the owner had knowledge of, or anything to do with creating or maintaining the nuisance, which consisted in diverting a water-course, or that he was at fault at the time, the mere fact of ownership does not create any liability against such landlord.[292] So where the owner of an apartment house rents only the apartments, reserving to himself and taking care of the hallways and a passageway to the sidewalk by a janitor, and the tenants have no control over or charge of the hallways or passageways, it being the duty of the owner to use ordinary care to keep the approaches or passageways from the public street, used in common by his tenants in a reasonably safe condition, such owner is held not liable to a visitor to one of his tenants, caused by slipping upon a patch of smooth ice formed by natural causes and not removed by the owner from such approaches or passageways within a reasonable time after a fall of snow and sleet which caused it, it not being of such a rough and uneven character as to cause an obstruction.[293] And the principle that the landowner who erects a nuisance on his land cannot divest himself of liability by a demise of the property to another is held not to apply where the structure or work is not of itself a nuisance and where the letting is general in its character. In such case if the use of such structure

290. Grogan v. Broadway Foundry Co., 87 Mo. 321, 327.

291. Metropolitan Savings Bk. v. Manion, 87 Md. 68, 69, 39 Atl. 90; citing and quoting from Maenner v. Carroll, 46 Md. 216, per Alvey, J.; Owing v. Jones, 9 Md. 117, per Le Grand, Ch. J. See Eastlock v. Local Board of Health (N. J.), 52 Atl. 999.

292. Maxwell v. Shirts, 27 Ind. App. 529, 61 N. E. 754, 87 Am. St. Rep. 268.

293. Harkin v. Crumbie, 20 Misc. 568, 46 N. Y. Supp. 453, rev'g 35 N. Y. Supp. 1027, 70 N. Y. St. R. 731. See, also, Laufers-Weiler v. Borchardt, 88 N. Y. Supp. 985.

or work does not ex necessitate make a nuisance, but if after the letting it is used by the tenant so as to create one then the tenant alone should be liable. This rule is applied to the owner of a railroad roundhouse which was not a nuisance at the time of the leasing and only became one upon its use by the tenant, and a judgment below for the plaintiff who claimed against such owner to have been injured and damaged in her property and comfort was reversed.[294] Again, cellar doors or cellar openings in a sidewalk constructed by an abutting owner are not unlawful and a nuisance *per se* when properly constructed, in good repair, and affording when closed a safe passageway for those traveling on the sidewalk and where it is so constructed and in good condition at the time of the demise and otherwise is within the above principles the landlord is not liable for injuries sustained by a pedestrian in falling through the open door.[295] So where a building is for a lawful purpose which cannot become injurious only under special circumstances the lessor will not be liable unless he knew or had reason to believe that the business would be so conducted as to render it a nuisance.[296] And if a barn erected to be used in a certain way proves a nuisance by reason of water in the cellar, and that is a special, unusual circumstance, the owner is not liable, unless he knew, or had reason to believe when he let the barn that the use of it in the ordinary mode would prove a nuisance.[297] In an Ohio case it is held that where one owned certain premises which he fitted up for the sale of dry goods and groceries by his tenant and he agreed with the tenant that he would construct the shelving and other fixtures and fasten them to the wall so that they would be safe and they were put in the room by the landlord so carelessly and negligently that they fell upon and injured a customer of the tenant who sued the owner for damages it was held that he could not recover. The court said: "Indeed the noxious fixtures complained of, did not amount to a nuisance at all in the legal sense of the term. They were not maintained in violation of any right of the public or of any member of the public. They were made

294. Terminal Co. v. Jacobs, 109 Tenn. 727, 72 S. W. 954, 61 L. R. A. 188.

295. Felhauer v. City of St. Louis 178 Mo. 635, 77 S. W. 843.

296. Fish v. Dodge, 4 Denio (N. Y.), 311, 317, 47 Am. Dec. 254.

297. Pickard v. Collins, 23 Barb. (N. Y.) 444.

unsafe, it is true, but did not tend to endanger the person or property of strangers to the premises. They were made unsafe to persons and things which might be for the time being in the store-room, but no person or thing could rightfully be there except by pemission and upon request of the lessees. * * * Whatever, therefore, may be the right of the plaintiff as such customer of the tenant, it is quite clear that he has no remedy against the lessee as the erector or maintainer of either a public or private nuisance." [298]

§ 467. **Liability of landlord to tenant.**—A landlord may become liable to a tenant by reason of the defective construction or condition of the premises; thus where there were several tenants in the building and a water closet in the upper part, to which all the tenants had access, had, though properly constructed, become out of order, owing to the tenants negligence, of which fact the landlord had notice, and overflowed and injured the goods of plaintiff, who rented and occupied a lower story, it was held that the landlord was liable for damages.[299] In a Michigan case it is held that a declaration which sets up the construction and continuance of a nuisance by the landlord, the defendant, upon his own land, which the plaintiff went into the possession of as tenant without knowledge of the existence and cause of the nuisance; but that the landlord had knowledge of the same and concealed the cause thereof from the plaintiff discloses a cause of action in tort resting upon the duty of the landlord to disclose to the lessee defects in the leased premises amounting to nuisances which were calculated to impair and did impair the health of the plaintiff as lessee. In this case the cause alleged did not rest upon any covenant express or implied of the landlord to repair the premises, nor that they were habitable at the time the lease was made, nor did it rest necessarily upon the relation of landlord and tenant, but was based

298. Burdick v. Cheadle, 26 Ohio St. 393, 396, 397. Considered in Langahaugh v. Anderson, 68 Ohio, 131, 67 N. E. 286, 14 Am. Neg. Rep. 170, 182.

299. Marshall v. Cohen, 44 Ga. 489, 9 Am. Rep. 170.

Liability Generally of Landlord for damages to property of tenant caused by defective premises. See note 11 Amer. Neg. Rep. pp. 315-322.

upon the maxim that every man must so use his own premises as not to injure others either in person or property, rightfully in the vicinity.[300] Under an Iowa decision the owner of a tract of land conveyed a portion thereof, reserving a private way for cattle. Subsequently the grantee obstructed the way, and in an action by the lessee of the balance of the tract for damages from the obstruction, defendant contended that, as the lessee was only a tenant for years he could not avail himself of the reservation; it was held that the tenancy gave the lessee a right to the way, and the covenant in the lease as to the reservation did not affect the case.[301]

§ 468. **Liability of tenant.**—The ordinary rule of law is that the landlord's liabilities in respect of possession are in general suspended as soon as the tenant commences his occupation,[302] for generally and *prima facie,* where lands are in the occupation of a tenant he alone is responsible for any nuisance thereon arising from their being out of repair. And it is declared that it is not the general rule that an owner of land is, as such, responsible for any nuisance thereon. It is the occupier and he alone to whom such responsibility generally and *prima facie* attaches.[303] So it is held that trustees, in occupation of premises and receiving the benefit thereof, may be regarded as principals in maintaining a nuisance, as well also as upon the grounds that a tenant in possession is liable for damages caused by his premises being out of repair.[304] And where the lessee of real estate creates a public nuisance *per se* an action may be maintained against him to abate or remove the nuisance.[305] So restoring a structure which was a nuisance to a right of way, and which has been abated, will render a tenant for years liable, although the structure existed before the commence-

300. Kern v. Myll, 80 Mich. 525, 45 N. W. 587, 8 L. R. A. 682.

301. Morrison v. Chic. & N. W. Ry. Co., 117 Iowa 587, 91 N. W. 793.

302. Felhauer v. City of St. Louis, 178 Mo. 635, 646, 77 S. W. 843, per Bruce, P. J.; quoting from Taylor's Landlord & Tenant (8th Ed.) § 174.

303. Ahern v. Steele, 115 N. Y. 203, 209, 26 N. Y. St. R. 295, 22 N. E. 193, 5 L. R. A. 449, 40 Alb. L. J. 424, 12 Am. St. Rep. 778, per Earl, J., rev'g 48 Hun, 517, 16 N. Y. St. R. 24.

304. Murray v. Archer, 5 N. Y. Supp. 326, 24 N. Y. St. R. 366, 1 Silv. S. Ct. 366.

305. City of Valaparaiso v. Bozarth, 153 Ind. 536, 47 L. R. A. 487, 55 N. E. 439.

ment of his tenancy, but merely refitting it after it has been injured but not abated, will not render him liable.[306] The lessee of a theatre is also liable for obstruction to access to adjacent premises by reason of the assembling of a crowd in the street previous to the opening of the theatre doors.[307] But a lessee in actual occupation of premises, in front of which are cellar doors in the sidewalk which are constructed and maintained in a reasonably safe condition for passage over them, is not liable to a pedestrian for injuries sustained in falling through said doors when open, where such lessee had no knowledge that they were open and could not by reasonable care have discovered that fact; some person or persons not in the lessees employ and without his authority or consent having opened the doors.[308] In a New York case in the Court of Common Pleas it was held that a coal hole constructed in the sidewalk without lawful authority was a nuisance rendering the lessee or occupant liable for damages for an injury occasioned thereby to a third person. This decision was reversed, it being declared that it was not necessary to determine whether the coal hole was a nuisance so as to render defendant liable for any damages resulting from its maintenance, regardless of the question of negligence, which question should have been submitted to the jury.[309] But an occupant of an upper floor, the title being assumed to be in the parties in possession, there being no evidence of title, is liable to an occupant of a lower floor whose property is injured by leakage from the floor above, resulting from said floor being badly constructed and not having been put in repair by defendant.[310]

§ 469. **Liability where term of lease is nine hundred and ninety-nine years.**—Where the question is whether a tenant, under a lease for a term of nine hundred and ninety-nine years, becomes

306. McDonnell v. Gilman, 3 Allen (85 Mass.) 264, 80 Am. Dec. 72.

307. Barber v. Penley (1893), 2 Ch. 447.

308. Felhauer v. City of St. Louis, 178 Mo. 635, 77 S. W. 843.

309. Kuechenmeister v. Brown, 1 N. Y. App. Div. 56, 72 N. Y. St. R. 147, 37 N. Y. Supp. 95, rev'g 13 Misc. 139, 34 N. Y. Supp. 180, 68 N. Y. St. R. 230.

310. Patton v. McCants, 29 S. C. 597, 6 S. E. 848.

responsible for damages caused by the existence of a structure upon the demised premises which is a nuisance, when such structure was put there by his lessor prior to the making of the lease, and when the tenant maintains it in the condition in which it came to him, and rebuilds it when it falls out of repair; the answer to such question depends upon the estate which the tenant has by virtue of his lease. The law imposes upon an ordinary tenant for years the duty of keeping the demised premises in repair, and of returning them at the end of his term in approximately the same condition in which he received them. If he fails to do this and suffers the estate to go to decay for want of necessary repairs the law makes him liable to his landlord as for a permissive waste. So, too, if he does any act which injures the inheritance his lessor may recover against him as for a voluntary waste. This being so, it follows necessarily that a lessee is under no obligation to a third person either to tear down or suffer to fall into decay a structure upon the demised premises which, in the state in which it was at the commencement of the term, is a nuisance to such person. The law does not impose upon anyone the duty of performing an act for the benefit of one person which will necessarily subject him to liability at the hands of another. In those cases in which the nuisance exists at the time of the creation of an estate for years and the lessee does nothing except to maintain the demised premises in the condition in which he received them, the person who suffers from the nuisance must look to the landlord, and not to the tenant for redress.[311]

§ 470. **Liability — Landlord and tenant — Obligation to repair.**—The general rule of law is that the tenant and not the owner is responsible for injuries received in consequence of a failure to keep the premises in repair. To this general rule these exceptions exist. (1) When the landlord has by an express agreement between the tenant and himself agreed to keep the premises in repair, so that in case of a recovery against the tenant he would have his remedy over against the landlord, then, to avoid circuity

311. Meyer v. Harris, 61 N. J. L. 83, 98, 99, 38 Atl. 690, language of Gummere, J.

of action, the party injured by defect and want of repair may have his action in the first instance against the landlord. (2) When the premises are let with the nuisance upon them, by means of which the injury complained of is received. (3) Where the landlord rents premises for a purpose, which in the very nature of things, would become a public nuisance.[312] Another general rule is that the landlord is not bound to make repairs unless he has assumed such duty by express agreement with the tenant. This rule is, however, subject to the exception that where there exist defects in the demised premises, attended with danger to an occupant, which a careful examination would not disclose, and which are not known to the tenant but are known by the landlord to exist, then an obligation rests upon the landlord to notify the tenant of such defects, and a failure to make such disclosure may well be placed upon the ground of fraud upon the tenant. So an instruction is not erroneous which does not require that fraud should be proven in such case, but only concealment of the defect.[313] Again the right of an owner to enter upon the demised premises and make repairs will not make the owner liable for a nuisance thereon when he would not otherwise be responsible. And an owner who has demised premises for a term during which they become ruinous, and thus a nuisance, is not responsible therefor unless he has covenanted to repair. It has even been held that an owner may demise premises so defective and out of repair as to be a nuisance, and if he binds his tenant to make the repairs he is not responsible for the nuisance during the term, but these would not now be generally received as authority.[314]

312. Fleischner v. Citizens Real Est. & Invest. Co., 25 Oreg. 119, 126, 35 Pac. 174, 175, language of Moore, J.

Covenants to repair generally. See notes, 95 Am. Dec. 118-125; 49 Am. Dec. 374-375.

313. Borggard v. Gale, 205 Ill. 511, 68 N. E. 1063, aff'g 107 Ill. App. 128. Action on the case for damages for injury sustained by tenant through defect in premises leased.

314. Ahern v. Steele, 115 N. Y. 203, 209, 26 N. Y. St. R. 295, 5 L. R. A. 449, 22 N. E. 193, 12 Am. St. Rep. 778, 40 Alb. L. J. 424, per Earl, J., rev'g 48 Hun, 517, 16 N. Y. St. R. 24. See Fisher v. Thirkell, 21 Mich. 1, 4 Am. Rep. 422.

Repairs. Distinction between several tenements in building and lease of entire dwelling.

"**The landlord retains control, and responsibility,** to a greater or less extent, for the condition of those parts of the building which are

§ 471. **Same subject—Instances.**—Where it was conditioned in the lease that a wharf should be kept in repair by the lessees such a provision, even though the lessees were in possession, was held not to relieve the defendants, who had leased an unsafe and defective wharf, from liability to a laborer who had received fatal injuries, by the falling of the wharf, while he was assisting in discharging a cargo from a steamer.[315] So a lessee who sublets a pier, which he had covenanted to keep in repair, will be liable for injuries sustained by a third person because of the defective and ruinous condition of the pier. Such person being lawfully thereon and exercising due care at the time of the injury.[316] In another case the plaintiff, a driver of a job wagon, was injured by stepping into a hole in a wharf, while attempting to carry a seaman's chest on board a vessel. The part of the wharf where the accident occurred was leased to others by the agents of the owners of the wharf, for the purpose of loading and dispatching vessels, the agents being bound to repair. Persons going to the vessel were compelled by obstructions in other parts of the wharf to take the route which plaintiff took, which was through a shed. It was held that the owners and agents were liable for the injury, but that the liability was not joint. A verdict against both was allowed to stand against the agents on the discontinuance of the action as against the owners of the wharf.[317] The owner has also been held

used in common by or for all the tenants, or those whom they invite there, such as the sidewalks, the halls and stairways, and the basement space devoted to coal bins, and also of certain classes of apparatus, such as the hot water or steam pipes, dumb waiters, etc., employed to heat the apartments or supply other conveniences. Thus he has a degree and kind of responsibility for the fit condition of these places and things in his control which he could not be charged with in the case of leasing outright an entire dwelling or other building. They are not part of the demised premises, and therefore the principle that the landlord is not bound to put or keep the demised premises in repair has no application." Chaplin Landlord and Tenant, § 488, quoted in Harris v. Boardman, 68 N. Y. App. Div. 436, 74 N. Y. Supp. 963, 11 Am. Neg. Rep. 311. See, also, note to this case, 11 Am. Neg. Rep. 316.

315. Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295, and note 304.

316. Clancey v. Byrne, 56 N. Y. 129, 15 Am. Rep. 391, and note 398.

317. Campbell v. Portland Sugar Co., 62 Me. 552. Syllabus in 16 Am. Rep. 503.

liable, notwithstanding tenants in occupation of the premises have covenanted to keep them in repair, where ice and snow, falling from the roof of the building so occupied, has injured a pedestrian upon the highway, it not appearing that the roof was under the tenants control.[318] But in a later case, where the injury was occasioned by like causes, the owner was held not liable, the entire building being let to a tenant under a covenant to "make all needful and proper repairs, both internal and external."[319] Again, the lessor is not liable where the premises are to be kept free from nuisances by the tenant who is also to make ordinary repairs, and the nuisance complained of consists of filthy percolations from a vault, and the lease had been made three years before notice of such nuisance was received.[320] Nor does the right of the owner to enter and repair render him liable for an injury to an occupant of adjoining premises, sustained by reason of decayed steps in the rear of the leased property, such steps not being a nuisance.[321]

§ 472. **Whether owner, occupant, contractor or sub-contractor liable.**—If a nuisance necessarily occurs in the ordinary mode of doing work the owner or occupant is liable, but if it happened by the negligence of the contractor or his servants the contractor alone is liable.[322] And unless the source of the injury was a nuisance

318. Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 378; Shipley v. Fifty Associates, 101 Mass. 251, 3 Am. Rep. 346.

319. Leonard v. Storer, 115 Mass. 86, 15 Am. Rep. 76, and note 78.

320. Pope v. Boyle, 98 Mo. 527, 11 S. W. 1010.

321. Sterger v. Van Sicklen, 132 N. Y. 499, 44 N. Y. St. R. 863, 30 N. E. 987, 45 Alb. L. J. 494, aff'g 28 N. Y. St. R. 627, 7 N. Y. Supp. 805.

322. Chicago v. Robbins, 2 Black (67 U. S.) 418. See Thomas v. Harrington, 72 N. H. 45, 54 Atl. 285.

"Contractor" Defined. "Although in a general sense, every person who enters into a contract may be called a 'Contractor,' yet that word, for want of a better one, has come to be used with special reference to a person who, in the pursuit of an independent business, undertakes to do a specific piece of work for other persons, using his own means and methods, without submitting himself to their control in respect of all its details. The true test of a 'contractor' would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. If he never serves more than one person, there is usually a

when a contractor with the defendant assumed control, and it was under such contractors exclusive control, no liability attaches to the defendant for such injury.[323] And where work is so performed by a contractor for his principal that a nuisance exists the principal becomes liable to others for subsequent and consequent injuries therefrom where he accepts the work in such a condition.[324] So if one employs another to do a lawful act and he commits a public nuisance in doing it the employer is not responsible, unless a public offense is necessarily involved in doing of such act.[325] But where a person has control of property and he permits a public nuisance to be erected or maintained thereon, even though it is incidental to what might otherwise be a lawful work, he is liable therefor.[326] Again, a landlord and owner of premises which is a tenement house and who has contracted to have certain alterations made therein and which was let to a sub-contractor is held not liable for injuries sustained by an infant son of a tenant occasioned by an obstruction in a hallway of the premises placed there

presumption that he has no independent occupation; but this presumption is not conclusive. . . . One who has an independent business, and generally serves only in the capacity of a contractor, may abandon that character for a time, and become a mere servant or agent, and this, too, without doing work of a different nature from that to which he is accustomed. If he submits himself to the direction of his employer as to the details of the work, fulfilling his wishes, not merely as to the result, but also as to the means by which that result is to be attained, the contractor becomes a servant in respect to that work. And he may even be a contractor as to part of his service, and a servant as to part." Sherman & Redfield on Negligence (5th Ed.) §§ 164, 165. See Green v. Soule, 145 Cal. 96, 78 Pac. 337; Parkhurst v. Swift, 31 Ind. App. 521, 68 N. E. 620; Keys v. Second Baptist Church, 99 Me. 308, 59 Atl. 446; Karl v. Juniata County, 206 Pa. 633, 56 Atl. 78.

323. Burbank v. Bethel Steam Mill Co., 75 Me. 373, 46 Am. Rep. 400.

324. Vogel v. Mayor, etc., of New York, 92 N. Y. 10, 44 Am. Rep. 349, rev'g 24 Hun, 657.

325. Peachey v. Rowland, 13 C. B. 182, 17 Jur. 764, 22 L. J. C. P. 81. See Barnes v. Akroyd, L. R. 7, Q. B. 474, 41 L. J. M. C. 110, 26 L. T. 692, 20 W. R. 671; Queen v. Stephens, 7 B. & S. 710, 12 Jur. N. S. 961, L. R. 1 Q. B. 702, 14 L. T. 593, 14 W. R. 859, 10 Cox C. C. 340. See Salliotte v. King Bridge Co., 58 U. S. C. C. A. 466, 122 Fed. 378.

326. Davie v. Levy, 39 La Ann. 551, 2 So. 395.

by the servants of the sub-contractor, where such owner had no control over the contractor, sub-contractor, or the workmen or either, and in no way interfered with the work or exercised any direction or control in regard thereto, and the work was not of itself dangerous to the occupants of rooms in the house or to those who used the hallways but was a lawful work, and the contractor had no right or authority or power to interfere with the hallway or obstruct it. Nor under such facts is the landlord chargeable for a nuisance the act of obstructing the hallway not being that of the owner or of his servants or agent but that of a third party and was not the result of the ordinary method of doing work intrusted to an independent sub-contractor, and was caused by the negligence of the contractor or his servants in a matter purely collateral to the contract.[327]

327. Boss v. Jarmulowsky, 81 N. Y. App. Div. 577, 81 N. Y. Supp. 400.

Where work is contracted to be done which is not of itself dangerous, but becomes so by the negligence of the contractor, the employer is not liable for injuries resulting therefrom; but if the work is dangerous of itself, unless guarded and the employer makes no provision in his contract for its being guarded, and does not make a proper effort to guard it himself, then he is negligent, and cannot escape liability on the ground that the work was done by a contractor. Wood v. The Independent School District of Mitchell, 44 Iowa, 27, 30.

Employer not liable for contractor's negligence. Same principle governs negligence of sub-contractor. Shearman & Redfield on Negligence (5th Ed.) § 168.

Rule as to liability of owner and independent contractor. Negligence. In the following case a judgment for the plaintiff below was affirmed, and although the question of negligence is that involved, nevertheless, the principles upon which the opinion is based are of importance in connection with the principles underlying the decision given in the text to which this note is appended. The opinion of the court is as follows:

"Haney, Ch. J. This action was brought to recover for injuries caused by falling into an open ditch on or near premises in the city of Sioux Falls owned by the defendant and occupied by a tenant. For the purpose of connecting her tenement with the city sewer, defendant employed skilful and careful contractors, under an agreement whereby they were to dig the ditch, lay the pipe, make connections, furnish all materials, and do everything necessary to complete the work for $31. The work was begun Friday, August 4, 1899, and completed on the following Monday. The ditch extended from near the centre of the street, under the sidewalk, and across de-

§ 473. Immoral, illegal and unlawful use of property.—Who liable.—One who knows that his property is used as a place for prostitution; that the sole business of its occupants is such; and

fendant's lot to the house. There was no fence where the ditch entered the lot. The walk was on a level with the lawn, and two feet from the line of the lot. The accident occurred between nine and ten o'clock Sunday evening. The pipe had then been laid, and the ditch filled from the center of the street to the walk, but was open from the walk to the house. There were no lights or guards to give warning of the danger. In passing along the walk plaintiff fell into the ditch, and was injured. The jury having returned a verdict for $2,000, defendant appealed from the judgment entered thereon. The jury having found under proper instructions that ordinary care was not exercised to protect persons passing on the walk at the time of the accident, and that the plaintiff was not guilty of contributory negligence, the only question demanding attention is whether the contractors, who, without defendant's knowledge, left the excavation unguarded, are alone liable for plaintiff's injuries. It is disclosed by the evidence that the work was done by independent contractors. Respondent concedes the general rule to be that property owners are not responsible for injuries caused by the negligence of competent, independent contractors, but contends that there are certain well established exceptions to the general rule, and that this case falls within such exceptions. Actions in which the liability of property owners for the negligence of independent contractors has been involved are so numerous that an exhaustive review of them would extend this opinion beyond all reasonable limits. 16 Am. & Eng. Enc. Law (2nd Ed.) pp. 187-210; note to Covington & Cincinnati Bridge Co. v. Steinbrock (Ohio) 76 Am. St. Rep. 375 (s. c. 61 Ohio St. 215, 7 Am. Neg. Rep. 154, 55 N. E. Rep. 618), The issues presented by this appeal have received thoughtful consideration. While the legal principles involved in this class of litigation are stated by the authorities with measurable clearness and precision, their proper application to the facts of any particular case is often extremely difficult. For the purposes of this appeal the general rule, with its qualifications, may be stated thus: While the master is liable for the negligence of the servant, yet when the person employed is engaged under an entire contract for a gross sum in an independent operation, and is not subject to the direction and control of his employer, the relation is not regarded as that of master and servant, but as that of contractor and contractee; and in such case the general rule is that the negligence of the contracting party cannot be charged upon him for whom the work is to be done; and this rule is applicable, even where the owner of the land is the person who hires the contractor, and for whose benefit the work is done. If, however, the performance of the work will necessarily bring wrongful consequences to pass

who thus knowing continues from month to month to permit such occupancy must be held to rent such property to "be used" as a place of prostitution, and is responsible in damages to an ad-

unless guarded against, the law may hold the employer answerable for negligence in the performance of the work. Boomer v. Wilbur, 176 Mass. 482, 8 Am. Neg. Rep. 246, 57 N. E. Rep. 1004. If the work contracted for is of such a character that it is intrinsically dangerous, or will probably result in injury to third persons, one contracting to have it done is liable for such injuries though the injury may be avoided if the contractor take proper precautions, there being a distinction between such a case and one in which the work contracted for is such that, if properly done, no injurious consequences can arise. As was stated by Cockburn, C. J., in Bowe v. Peate, 1 Q. B. Div. 321: 'There is an obvious difference between committing work to a contractor to be executed, from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability from injury resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise.' 16 Am. & Eng. Enc. Law (2nd Ed.) p. 201. The contract in the case at bar contemplated an excavation in one of the principal streets of the city of Sioux Falls. The work contracted for could not be done without creating a condition in the public thoroughfare from which mischievous consequences might reasonably be expected to arise unless preventive measures were adopted. An excavation for the purpose of constructing a sewer may not be unlawful, but it is certainly intrinsically dangerous, and, unless properly guarded, liable to cause personal injuries. The nature of the work demands more than its proper performance. Digging the ditch and laying the pipe are not enough. Lights, barriers, or other safeguards are required during the progress of the work to protect persons from such accidents as the one resulting in plaintiff's injury. Where the work contemplated by the contract is of such a nature that public safety requires something more to be done than the mere construction of the improvement, we think the owner of the property owes a duty to the public to see that proper safeguards are taken, and that, where such precautions are not taken, he should not escape liability for resulting injuries." McCarrier v. Hollister, 15 S. Dak. 366, 89 N. W. 862, 11 Am. Neg. Rep. 641. See, also, note, id. 641.

When owner or employer liable to third persons—Independent contractor. See generally the

jacent proprietor residing with his family on such adjoining property, and he may be enjoined from permitting such occupancy to continue, a landlord should at least use reasonable care and diligence in ascertaining the use to which his property is applied, having due care and regard for his neighbors' rights.[328] So one who hires lodging rooms in a dwelling house and uses them for immoral purposes is liable; for a person who wrongfully injures the good name of a boarding house, lodging house, hotel or other place of entertainment is responsible in damages.[329] In a Maine decision it is held that under an indictment for aiding and maintaining a nuisance contrary to the statute in permitting a tenement under defendant's control to be used for illegal purposes it must appear in order to constitute the offense that the tenement was either let for the illegal use or that such use was permitted; but the mere fact that the defendant has control of the tenement does

following cases: Adams Express Co. v. Schofield, 23 Ky. L. Rep. 1120, 64 S. W. 903; Keys v. Second Baptist Church, 99 Me. 308, 59 Atl. 446; Corrigan v. Elsinger, 81 Minn. 42, 83 N. W. 492; Omaha Bridge & Terminal Co. v. Hargadine, 5 Neb. (unofficial) 418, 98 N. W. 1071; Johnston v. Phoenix Bridge Co., 169 N. Y. 581, 62 N. E. 1096; aff'g 44 N. Y. App. Div. 581, 60 N. Y. Supp. 947; Davis v. Summerfield, 133 N. C. 325, 63 L. R. A. 492, 45 S. E. 654, 42 S. E. 813; Macdonald v. O'Reilly, 45 Oreg. 589, 78 Pac. 753; James McNeil & Bros. Co. v. Crucible Steel Co., 207 Pa. 493, 56 Atl. 1067; Ziebell v. Eclipse Lumber Co., 33 Wash. 591, 74 Pac. 680. See Nelson v. Young, 180 N. Y. 523, 72 N. E. 1146, aff'g 91 N. Y. App. Div. 457, 87 N. Y. Supp. 69.

When owner or employer not liable to third persons—Independent contractor. See generally the following cases: Chattahoochee & G. R. Co. v. Behrman, 136 Ala. 508, 35 So. 132; Francis v. Johnson (Iowa), 101 N. W. 878; Jahns, Amd'r, v. Wm. H. McKnight & Co., 25 Ky. L. Rep. 1758, 78 S. W. 862; Strauss v. Louisville (Ky.), 55 S. W. 1075; Wilbur v. White, 98 Me. 191, 56 Atl. 657; Pearl v. West End St. Ry. Co., 176 Mass. 177, 49 L. R. A. 826, 57 N. E. 339; Lenderink v. Village of Rockford, 135 Mich. 531, 98 N. W. 4, 10 Det. L. N. 832; Overseer of Highways, etc., v. Pelton, 129 Mich. 31, 87 N. W. 1029, 8 Det. L. N. 842, under Comp. L. 1897, 4160; Aldritt v. Gillette-Herzog Mfg. Co., 85 Minn. 206, 88 N. W. 741; Kueckel v. Ryder, 170 N. Y. 562, 62 N. E. 1096, aff'g 54 N. Y. App. Div. 252, 66 N. Y. Supp. 522; Korn v. Weir, 88 N. Y. Supp. 976; Bryson v. Philadelphia Brewing Co., 209 Pa. 40, 57 Atl. 1105.

328. Marsan v. French, 61 Tex. 173, 48 Am. Rep. 272.

329. Sullivan v. Waterman, 20 R. I. 372, 39 L. R. A. 773, 39 Atl. 243.

not make him liable he must be proved to consent to the illegal use, and if such use is known to him and he takes no measures to prevent it his inaction may be evidence of his consent or permission. This rule applies to both the owner and the one authorized to let the tenement.[330] In the case of liquor nuisances the following persons have been held liable: The owner of the building;[331] all persons interested as owners;[332] the owner and lessee of the building and the keeper with knowledge of the use;[333] a non-resident owner with knowledge, who maintains the place by an agent;[334] the owner and the premises;[335] one in control of the premises and his servants;[336] one who having knowledge permits another to keep liquors in his house for illegal sales;[337] the owner who assents to the use of his tenement for unlawful sales;[338] the owner or keeper;[339] a dramshop keeper or his agent or keeper with knowledge and intent to illegally sell;[340] one who assists as keeper, though he has not sole custody of the place;[341] one who carries on a tenement for illegal sales;[342] a husband as keeper, where he owns, controls or occupies a house where his wife with his knowledge and permission or without his objection makes illegal sales;[343] a lessee;[344] an express company;[345] and a bank.[346] But a mortgagee without control, possession or right to possession is not liable as a person interested under the statute.[347] If a statute makes the "owners, lessees, occupants,

330. State v. Frazier, 73 Me. 95, under Rev. S. C. 17 § 4.

331. State v. Price, 92 Iowa, 181, 60 N. W. 514.

332. Shear v. Green, 73 Iowa 688, 36 N. W. 642.

333. Bell v. Glaseker, 82 Iowa, 736, 47 N. W. 1042.

334. State v Collins, 74 Vt. 43, 52 Atl. 69.

335. Carter v. Bartel, 110 Iowa, 211, 81 N. W. 462.

336. State v. Moore, 49 S. C. 438, 27 S. E. 454.

337. Commonwealth v. Lynch, 160 Mass. 298, 35 N. E. 854.

338. Commonwealth v. Hayes, 167 Mass. 176, 45 N. E. 82.

339. State v. Lewis, 63 Kan. 265, 65 Pac. 258.

340. Nicholson v. People, 29 Ill. App. 57.

341. State v. Lord, 8 Kan. App. 257, 55 Pac. 503.

342. Commonwealth v. Burns, 167 Mass. 374. 45 N. E. 755.

343. Commonwealth v. Walsh, 165 Mass. 62, 42 N. E. 500.

344. Tron v. Lewis, 31 Ind. App. 178, 66 N. E. 490.

345. Dosh v. United States Exp. Co. (Iowa), 93 N. W. 571.

346. State v. Snyder, 108 Iowa 205, 78 N. W. 807.

347. State v. Massey, 72 Vt. 210, 47 Atl. 834. See further as to lia-

managers or agents of any building, establishment or premises from which dense smoke" is emitted guilty of a misdeamor, it is sufficient in an indictment against a "manager" of a "building," etc., thus emitting dense smoke, etc., to allege and prove that he is a "manager" of such building and if he is he is liable or responsible for having permitted the nuisance. It is unnecessary to either allege or prove affirmatively whether the concern of which he is a manager is a corporation or partnership.[348]

§ 474. **Liability of persons jointly and severally contributing.** —In case of a public nuisance all wrongdoers may be sued jointly or severally in a suit to abate such nuisance.[349] And where the acts of several individuals constitute a public nuisance they are jointly and severally liable at the suit of the parties specially damaged.[350] If damages are sustained by the erection or maintenance of a nuisance all persons who participate therein are held liable therefor.[351] A distinction exists, however, between the joint

bility for liquor nuisance State v. Frahm, 109 Iowa, 101, 80 N. W. 209; Steyer v. McCauley, 102 Iowa, 105, 71 N. W. 194; State v. Viers, 82 Iowa, 397, 48 N. W. 732; State v. Turner, 63 Kan. 714, 66 Pac. 1008; State v. Collins (N. H.), 44 Atl. 495; State v. Donovan, 10 N. D. 610, 88 N. W. 717; §§ 399-401 herein.

348. State v. Eyermann (Mo. App. 1905), 90 S. W. 1168; Laws 1901, p. 73, § 1.

349. People v. Gold Run Ditch & Mining Co., 66 Cal. 138, 56 Am. Rep. 80, 4 Pac. 1152; Valparaiso v. Moffit, 12 Ind. App. 250, 39 N. E. 909. See Woodruff v. North Bloomfield Gravel Min. Co., 8 Sawy. (U. S. C. C.) 628; Bloomhuff v. State, 8 Blackf. (Ind.) 205; Simmons v. Everson, 124 N. Y. 319, 36 N. Y. St. R. 265, 26 N. E. 911, 21 Am. St. R. 676, aff'g 32 N. Y. St. R. 1134; King v. Trafford, 1 B. & Ad. 874.

350. West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N. E. 879.

351. Prussak v. Hutton, 30 N. Y. App. Div. 66, 51 N. Y. Supp. 761; Sullivan v. McManus, 45 N. Y. Supp. 1079, 19 N. Y. App. Div. 167; Comminge v. Stevenson, 76 Tex. 642, 13 S. W. 556. See Olmstead v. Rich, 53 Hun, 638, 6 N. Y. Supp, 826; Anderson v. Dickie, 26 How., Pr. (N. Y.) 105; Graver v. Dodson Coal Co., 20 Pa. Co. Ct. 529; Rogers v. Stewart, 5 Vt. 215, 26 Am. Dec. 296; Wilson v. West & Slade Mill Co., 28 Wash. 312, 68 Pac. 716.

Parties out of jurisdiction need not be made defendants although nuisance has been erected and maintained by several Mississippi & Mo. R. R. Co. v. Ward, 2 Black (67 U. S.) 485.

acts of several parties and the several acts of separate parties acting independently of each other as in the former case each is liable for the entire damage[352] while in the latter case each person is liable for the damage occasioned by his acts to the extent of the separate injury committed by him, or for his proportion only of the damage if ascertainable, and he is not liable for the damage caused by the others,[353] and in order to hold one of two parties responsible for the entire damage caused by the construction and maintenance of a nuisance, a concert of action must be made to appear.[354] So several separate proprietors of disorderly houses are not liable jointly,[355] although two persons who, acting separately on different premises, produce through mechanical organs an aggregate noise constituting a nuisance are jointly liable in an equitable suit to enjoin.[356] If the injury or nuisance complained of arises from the individual acts of different persons; and such nuisance is merely incidental to and the result of such acts; and the injury is not caused by the joint acts of defendant and any other person, the defendant in such case is liable only for whatever damage it has caused by its own wrongful acts and for none other. Defendant cannot be held responsible for the entire injury where it only contributes thereto. The full damage should be apportioned among all the wrongdoers and the difficulty in determining what part of the damage has been occasioned by acts of the defendant constitutes no objection to granting relief.[357] So in case of a nuisance upon premises from the sewage of parties at a distance though the statute speaks only of one individual, yet if

352. Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. R. 856; Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566, aff'g 9 Hun, 517. Examine Cabulski v. Hutton, 62 N. Y. Supp. 166, 47 N. Y. App. Div. 107.

353. Loughran v. Des Moines, 72 Iowa, 382, 34 N. W. 172; Sloggy v. Dilworth, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; Martinowsky v. Hannibal, 8 Mo. App. 70; Chipman v. Palmer, 77 N. Y. 51, 33 Am. Rep. 566, aff'g 9 Hun, 517.

354. Bowman v. Humphrey, 124 Iowa 744, 100 N. W. 854.

355. Northern P. R. Co. v. Whalen, 3 Wash. Ty. 452, 17 Pac. 890.

356. Lambton v. Mellish (1894), 3 Ch. 163.

357. Watson v. Colusa-Parrot Mining & Smelting Co. (Mont., 1905), 79 Pac. 14.

each man's contribution can be ascertained an order can be made upon him to abate it.[358] But parties who severally contribute to the discharge of mill refuse into a stream will be liable and may be sued in equity as the remedy at law is inadequate. All of the defendants may be enjoined and if the question of damages is raised a reference may be had to determine the amount for which each is liable.[359] Again, a proprietor of a mill, who cuts a canal across a public road, whereby the passage along the highway is obstructed, and those who are in possession of the mill claiming under him and using the canal, are liable to an indictment for such obstruction, the one for creating and the others for continuing the nuisance. But, if a bridge is erected over the canal, neither is indictable, simply for suffering the bridge to be out of repair.[360]

§ 475. **Other persons who are and are not liable—Instances.**—In addition to the persons specifically enumerated under the preceding sections as liable for a nuisance the following persons have also been held responsible or proper parties defendants; a person operating an electric light plant;[361] a common scold;[362] the erector of a milldam when it is a public nuisance;[363] a person causing an obstruction to navigation;[364] a manager of another's business;[365] the

358. Guardians of Hendon Union v. Bowles, 20 L. T. N. S. 609. See Learned v. Castle, 78 Cal. 454, 21 Pac. 11, 18 Pac. 872.

359. Warren v. Parkhurst, 92 N. Y. Supp. 725, 45 Misc. 466.

Joint liability of city and citizens connecting houses with sewage system. See Carmichael v. Texarkana, 94 Fed. 561; Sellick v. Hall, 47 Conn. 260, 274.

360. State v. Yarrell, 34 N. C. (12 Ired. L.) 130.

361. Hyde Park Thompson-Houston Elec. Light Co. v. Porter, 167 Ill. 276, 47 N. E. 206, aff'g 64 Ill. App. 152.

362. Commonwealth v. Mohn, 52 Pa. St. 243, 91 Am. Dec. 153.

363. State v. Phipps, 4 Ind. 515.

364. South Carolina Steamboat Co. v. Wilmington, C. & A. R. Co., 46 S. C. 327, 24 S. E. 337.

365. Terry v. State, 24 Ohio Cir. Ct. R. 111.

Right to sue agent of State. injunction. See Holland's Assignee v. Cincinnati Dessicating Co., 97 Ky. 454, 30 S. W. 971, 53 Am. St. Rep. 414, 28 L. R. A. 394.

Criminal or penal liability of servant, agent or partner for nuisance. See note 41 L. R. A. 665.

Husband not liable as agent for wife. See People v. Crounse, 51 Hun, 489, 21 N. Y. St. R. 687.

purchaser and proprietor of an estate in land to which a ferry is appurtenant;[366] so the erector of a nuisance and the purchaser may be joined,[367] and owners of distinct interests or separate portions in severalty may also be joined;[368] so one creating a nuisance over a right of way is liable even though he has no interest in the land;[369] for it is not necessary in an action to abate a nuisance and for damages that a person charged with erecting the nuisance should be the owner of the freehold, or any part of it, upon which the nuisance is erected. It is sufficient if he is a party to the erection of the nuisance.[370] Again, a person who with full knowledge of the existence of a nuisance upon real estate, for which the owner would be liable, purchases the reversionary interest in such real estate, and receives the rents thereof from a tenant in possession, thereby voluntarily assumes the responsibility of such nuisance and becomes liable for the damages sustained in consequence thereof subsequent to his purchase.[371] So a licensee who exercises his limited right to excess so as to produce a nuisance is liable to have such nuisance abated to the extent of the excess, but if it cannot be abated without obstructing the right altogether, the exercise of the right may be stopped entirely until means have been taken to reduce it within its proper limits[372] and an action lies at common law for watching and besetting workmen.[373] But a singer who conscientiously takes part in religious services without intending to disturb the congregation by his singing is not indictable,[374] and it has recently been decided by the court of special sessions in the city of New York that a theatrical manager was not liable for

366. State v. Willis, 44 N. C. 223.

367. Brown v. Woodworth, 5 Barb. (N. Y.) 550.

368. Kingsbury v. Flavers, 65 Ala. 479, 39 Am. Rep. 14. Injunction was, however, refused in this case.

369. Harden v. Sinclaire, 115 Cal. 460, 47 Pac. 363, Cal. Code Civ. Proc. § 731.

370. Dorman v. Ames, 12 Minn. 451.

371. Pierce v. German Savings & Loan Soc., 72 Cal. 180, 13 Pac. 478.

372. Crossland v. Borough of Pottsville, 126 Pa. 511, 18 Atl. 15, 24 W. N. C. 328, 46 Phila. Leg. Int. 352, 20 Pitts. L. J. N. S 15.

373. Lyons v. Wilkins (1899), 1 Ch. 255, 68 L. J. Ch. 146, 63 J. P. 339, 79 Law T. N. S. 709, 47 W. R. 291.

374. State v. Linkhaw, 69 N. C. 214, 12 Am. Rep. 645.

the presentation of the play ent
sion." [374a]

374a. People v. Daly and Gumpertz, Vol. XXXV, No. 83, New York Law Journal, p. 1199:

"Olmsted, J.—The information herein charges the defendants with committing a public nuisance under the provisions of section 385 of the Penal Code, in that on the 30th day of October, 1905, in the county of New York, they offended public decency by the presentation of a theatrical performance—a play entitled 'Mrs. Warren's Profession.' * * * The principle of law which controls in this State as a test of criminality in an action such as this, was laid down by Mr. Justice Andrews in the People, etc., v Muller (122 N. Y. 408). The test by this rule is whether the matter complained of 'is naturally calculated to excite in a spectator impure imagination, and whether the other incidents and qualities, however attractive, are merely accessory to this as the primary or main purpose of the representation.'

"It is true that the action in which this rule was started was one prosecuted by indictment under section 317 of the Penal Code, and the obscene matter complained of consisted of photographs. The principle, however, was adopted by the Appellate Division of this department, and was cited with approval by Mr. Justice Barrett in his opinion affirming the conviction by this court of a defendant under section 385 of the Penal Code (People, etc., v. Doris, 14 App. Div. 117). This was a prosecution against a theatre manager for presenting an indecent theatrical performance. The

SUBDIVISION III.

DEFENSES.

SECTION 476. Proximate cause—Acts of third parties—Other sources or causes—Others contributing.
477. Pollution of waters from other sources.
478. Other or similar nuisances—Similar acts by others.
479. Where plaintiff contributes to, or maintains, similar nuisance.
480. Pollution of waters by plaintiff.
481. Negligence—Contributory negligence—Due care.
482. That water potable by cattle and inhabited by fish no defense for pollution.
483. Benefit to public; balancing conveniences.
484. Same subject.
485. Acquiescence, knowledge or failure to complain—Laches—Estoppel.
486. Other instances of defenses generally.
487. Same subject.

§ 476. Proximate cause.—Acts of third parties—Other sources or causes—Others contributing.—The injurious consequences or nuisance complained of should be the natural, direct and proximate cause of defendant's acts to render him liable for maintaining a public nuisance,[1] for it is a good defense that the tortious act was committed by others or third parties; and if the injurious results flow from acts done by others operating on the alleged nuisancer's acts as to produce such results, then he is not liable.[2] Nor is

comes to consider the question of the criminality of the acts of these defendants in publicly producing it, it must make application of the principle of law laid down by the Court of Appeals as the test of criminality. Making such application in the case at bar, it appears that instead of exciting impure imagination in the mind of the spectator, that which is really excited is disgust; that the unlovely, the repellant, the disgusting in the play, are merely accessories to the main purpose of the drama, which is an attack on certain social conditions relating to the employment of women, which, the dramatist believes, as do many others with him, should be reformed. Tried by this rule, the play does not come within the inhibition of the statute, and the defendants are acquitted. Wyatt, J., concurs. McAvoy, J., dissents."

1. State v. Holman, 104 N. C. 861, 10 S. E. 758; State v. Rankin, 3 S. C. 438, 16 Am. Rep. 737.

2. Dieter v. Estill, 95 Ga. 370, 22 S. E. 622; Brimberry v. Savannah,

he liable for nuisances resulting from other sources[3] over which he has no control,[4] although he may be liable when he consents to, or authorizes the erection of the nuisance by such third party.[5] It is held, however, that the owner of property may be primarily liable and have his recovery over from the third party who has created the nuisance without his consent.[6] But if the structure alleged to occasion the nuisance is the actual and principal factor in causing it, the fact that other causes combined to produce the consequences does not prevent his being held liable;[7] and it is no defense that others contribute to the nuisance.[8]

§ 477. **Pollution of waters from other sources.**— As between independent wrong doers there is no contribution and it will not avail as a defense that others with whom the complainant, in an injunction bill to restrain a nuisance, has no concern, have contributed to cause the pollution of the waters against which relief is sought.[9] So the fact that waters are impure and polluted from other and various sources or by other parties or causes does not constitute a defense by persons adding to such impurity, nor preclude relief from further pollution; for the fact that others have contaminated a water course does not entitle a person to add thereto.[10] So where the upper owner contributes to the pollution of

F. & W. R. Co. 78 Ga. 641, 3 S. E. 274; State v. Rankin, 3 S. C. 438; 16 Am. Rep. 737.

3. Farley v. Gate City Gaslight Co., 105 Ga. 323, 31 S. E. 193.

4. Warren v. Hunter, 1 Phila. 414.

5. Simpson v. Stillwater Co., 62 Minn. 444, 64 N. W. 1144.

6. Gray v. Boston Gas Light Co., 114 Mass. 149, 19 Am. Rep. 324 and note 328.

7. Ft. Worth & D. C. R. Co. v. Scott, 2 Wils. Civ. Cas. Ch. App. § 140. See Stevenson v. Ebervale Coal Co., 201 Pa. St. 112, 50 Atl. 818.

Jar and Vibration. Defendant may show injury due to other causes. See § 190 herein.

8. Seacord v. People, 121 Ill. 623, 13 N. E. 194, aff'g 22 Ill. App. 279; Evans v. Wilmington & W. R. Co., 96 N. C. 45, 1 S. E. 529; City of Newcastle v. Raney, 6 Pa. Co. Ct. R. 87. See id. 130 Pa. 546, 18 Atl. 1066, 6 L. R. A. 737, 27 Am. & Eng. Corp. Cas. 566, 20 Pitts. L. J. N. S. 345, 47 Phila. Leg. Int. 415, 25 W. N. C. 246.

That others contribute to nuisance no defense. Smoke fumes and gases. See § 142 herein.

9. Doremus v. Mayor, etc., of Paterson (N. J. E. 1905), 62 Atl. 3. 4.

10. West v. State, 71 Ark. 144, 71 S. W. 483 (Nuisance here was a stagnant pond and rule was applied in a criminal action); Morgan v. Danbury, 67 Conn. 484, 35 Atl. 499

a stream already polluted from above, but what he contributes makes the water unfit for stock, and charges it with noxious gases, when before it was fit for stock, and free from such gases, he is liable to the lower owner in damages.[11] The rule has also been applied where foul water was pumped into a canal, making it a nuisance.[12] But it is held that although such matter is not competent to defeat the action, yet it goes in mitigation of damages.[13] Notwithstanding the above rule it is decided that the defendant can show that other persons were making deposits in the stream

(there were other substances in the river with which the sewage came in contact); Barrett v. Mt. Greenwood Cemetery Assoc. 159 Ill. 385, 42 N.E. 391, 31 L. R. A. 109 (a case of cemetery drainage but waters polluted to some extent by drains and washings from manured lands); West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N. E. 879, Weston Paper Co. v. Pope, 155 Ind. 395; 56 L. R. A. 899, 57 N. E. 719; City of Richmond v. Test, 18 Ind. App. 428, 48 N. E. 610; State v. Smith, 82 Iowa, 423, 48 N. W. 727; West Arlington Imp. Co. v. Mount Hope Retreat, 97 Me. 191, 54 Atl. 982; Beach v. Sterling Iron & Z. Co., 54 N. J. Eq. 65, 33 Atl. 286 (stream here was polluted by discoloration); Butler v. Village of White Plains, 69 N. Y. Supp. 193, 59 App. Div. 30; Commonwealth v. Yost, 12 York Leg. Rec. 149 (rule applied to indictment); Indianapolis Water Co. v. American Strawboard Co., 57 Fed. 1000; Attorney Genl. v. Leeds Corporation, 39 L. J. Ch. 711, 19 W. R. 19, L. R. 5 Ch. 583, aff'g 22 L. T. 330. See Strokel v. Kerr Salt Co., 164 N. Y. 303, 51 L. R. A. 687, 58 N. E. 142, rev'g 49 N. Y. Supp. 1144. Compare Stevenson v. Ebervale Coal Co., 201 Pa. St. 112, 50 Atl. 818.

Through other sources than that of city defendant may have been responsible for the collection of objectionable sewage, such fact furnishes no defense if the city in fact contributed to the nuisance complained of and participated in the pollution of the waters that caused the injury. City of Kewanee v. Otley, 204 Ill. 402, 68 N. E. 388; citing Watson v. New Milford, 72 Conn. 561; Barrett v. Mount Greenwood Cemetery Assoc., 159 Ill. 385; Village of Kewanee v. Ladd, 68 Ill. App. 154; Weston Paper Co. v. Pope, 155 Ind. 395, 57 N. E. 719, 56 L. R. A. 899; Mansfield v. Hunt, 19 Ohio C. C. 488; Richmond Mfg. Co. v. Atlantic, etc., Co., 10 R. I. 106; Attorney Genl. v. Leeds, L. R. 5 Ch. 583, 28 Am. & Eng. Ency. of Law 968. Examine opinion in Missouri v. Illinois (the Chicago Drainage case), 200 U. S., part 5, given in full in § 299 herein.

11. Ferguson v. The Firmenich Mfg. Co., 77 Iowa 576, 42 N. W. 448. 14 Am. St. Rep. 319.

12. Attorney Genl. v. Bradford Navigation Co., L. R. 2 Eq. 71, 35 L. J. Ch. 619, 14 L. T. 248, 14 W. R. 579.

13. City of Richmond v. Test, 18 Ind. App. 428, 48 N. E. 610.

above plaintiff's property, defendant not being liable for the separate wrong of another.[14] It is also decided that it can be shown that another stream on the same premises was in whole or in part the source of the stench and that it was polluted by others.[15] But the State in a prosecution need not trace the impurities of a stream which is fouled by sewage at a certain point and lower down similar conditions exist.[16]

§ 478. **Other or similar nuisances—Similar acts by others.**—A nuisance cannot be justified by the existence of other nuisances of the same or a similar character if it can be shown that the inconvenience is increased by the nuisance complained of;[17] for the presence of other nuisances will not justify any one of them; or the more nuisances there were the more fixed they would be.[18] So the existence of other nuisances at the same time is no justification to defendant on an indictment for a nuisance where the question is, is the business of defendant productive of odors which are offensive to those within their range so that it produces physical discomfort?[19] Again, the fact that acts of the same kind, or that similar acts; or that the same kind of nuisance is being committed by others is no defense, as each and every one of such wrongdoers is liable.[20]

14. Tennessee Coal, Iron and Rd. Co. v. Hamilton, 100 Tenn. 252, 46 Am. St. Rep. 48, 14 So. 167 (action on the case for damages).

15. Shain Packing Co. v. Burrus, (Tex. Civ. App.), 75 S. W. 838. The character of this evidence however differs from that on which the rule is based.

16. State v. Glucose Sugar Refining Co., 117 Iowa 524, 91 N. W. 794.

17. Crossley v. Lightowler, 36 L. J. Ch. 584, 16 L. T. 438, L. R. 2 Ch. 478, 15 W. R. 801; Richards v. Daugherty, 133 Ala. 569, 31 So. 934; Burlington v. Stockwell, 5 Kan. App. 569, 47 Pac. 988; People v. Mallory, 4 Thomp. & C. (N. Y.) 567; Neville v. Mitchell, (Tex. Civ. App.) 66 S. W 579; Saville v. Kilner, 26 L. T. N. S. 277. Compare Kissel v. Lewis, 156 Ind. 233, 59 N. E. 478.

18. Rex v. Neil, 2 Carr. & P. 485, per Abbott, C. J.; a case of smells from defendant's manufactory.

19. Seacord v. People, 121 Ill. 623, 13 N. E. 194; Douglass v. State, 4 Wis. 387.

20. Baltimore v. Warren Mfg. Co., 59 Md. 96; Woodyear v. Schaeffer, 57 Md. 9, 40 Am. Rep. 419.

§ 479. **Where plaintiff contributes to or maintains similar nuisances.**[20a]—It is held that in a damage action for the creation of a nuisance defendant may show that plaintiff had established a nuisance on his own premises which contributed to the injury.[21] But it is held to be a defense that a party contributed materially to his own injury where he claims damage from the overflow caused by a bridge.[22]

§ 480. **Pollution of water by plaintiff.**[22a]—It is held that the fact that plaintiff himself had frequently fouled the stream to the injury of those below him gives no license to those above him to use the stream in a similar way and does not bar the right of plaintiff to recover.[23] And in an action by a lower reparian proprietor against an upper owner for the pollution of water and making deposits in the stream, filling up its channel and causing debris to be deposited on land, a plea that plaintiff was guilty of negligence contributing to the injury in that he failed to take due precautions to prevent it is insufficient,[24] and where the plaintiff owned property in the defendant city which, pursuant to its ordinances, drained into its sewers and thus into the stream, it was held that this did not show such contribution upon his part to the injury as to deprive him of equitable relief.[25] So where plaintiff also pollutes the stream contributing to a public nuisance, such fact constitutes no defense in an action against a city for polluting the same with sewage, to the plaintiff's special damage, the city, as a lower proprietor, not being specially injured.[26] But it is also held that the lower owner on a stream cannot recover of the upper owner for polluting it, when he himself pollutes it also, and

20a. See §§ 45-47 herein.

21. Holbrook v. Griffis, 127 Iowa 505, 103 N. W. 479. But compare Seacord v. People, 121 Ill. 623, 13 N. E. 291.

22. Peoria & Pekin Union Ry. Co. v. Barton, 38 Ill. App. 469. See Smith v. City of Auburn, 88 N. Y. App. Div. 396, 84 N. Y. Supp. 725.

22a. See §§ 45-47 herein.

23. Watson v. New Milford, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167.

24. Tennessee Coal, Iron & Rd. Co. v. Hamilton, 100 Ala. 252, 14 So. 167, 46 Am. St. Rep. 48 (action on the case for damages).

25. Platt Bros. & Co. v. Waterbury, 72 Conn. 531, 45 Atl. 154, 48 L. R. A. 691, 77 Am. St. Rep. 335.

26. Standard Bag & Paper Co. v. Cleveland, 25 Ohio Cir. Ct. R. 380.

thus contributes to the very injuries of which he complains.[27] Where, however, plaintiff had no knowledge of the fact that he was contributing to the pollution of a water course and showed an intention to remedy the condition as to his part, equitable relief against the pollution was not denied.[28]

§ 481. **Negligence — Contributory negligence—Due care.** — Negligence may have no application to the law of nuisance or it may exist in relation thereto,[29] but ordinarily negligence is not an essential element in an action for damages occasioned by a nuisance,[30] and contributory negligence of others is held no defense to a prosecution for a public nuisance.[31] Again, where one sinks an artesian well upon his own land, and uses the water to bathe the patients in a sanitarium or hospital erected by him on said premises, he is not liable to injunction and damages for allowing the water to flow into a stream which is the natural watercourse of the basin in which the artesian well is situated, the owner being free from negligence or malice and using all due care in avoiding injury to his neighbor.[32] And where a well of water is polluted by gases, it does not necessarily constitute an excuse that a gas company causing the injury uses all reasonable care in conducting its business.[33] So the fact that a manufacturing com-

27. Ferguson v. The Firmenich Mfg. Co., 77 Iowa, 576, 42 U. W. 448, 14 Am. St. Rep. 319.

28. West Arlington Imp. Co. v. Mount Hope Retreat, 97 Md. 191, 54 Atl. 982.

29. **Distinction between negligence and nuisance.** See § 18. herein.

Negligence as an element. See § 92 herein.

30. **Negligence. Care, reasonable care** or precaution or want thereof. See § 44 herein.

31. Louisville C. & L. R. Co. v. Commonwealth, 80 Ky. 143, 44 Am. Rep. 468. See §§ 45-47 herein.

Dead animal on railroad. Right of way. Contributory negligence. See § 199 herein.

32. Barnard v. Shirley, 135 Ind. 547, 34 N. E. 600, 35 N. E. 117, 41 Am. St. Rep. 454, 24 L. R. A. 568-575.

33. Belvidere Gaslight & F. Co. v. Jackson, 81 Ill. App. 424. See Indianapolis Water Co. v. American Strawboard Co., 57 Fed. 1000; Seacord v. People, 121 Ill. 623, 13 N. E. 194; Cooper v. Randall, 53 Ill. 24; Winslow v. Bloomington, 24 Ill. App. 647.

Question of reasonable care immaterial. Smells. See § 167 herein.

That stable properly built or kept no defense. See § 202 herein.

pany has expended a large sum of money in the construction of its plant, and that it conducts its business in a careful manner and without malice, will not relieve it from liability to a riparian owner for damages for depositing refuse matter into a stream.[34]

§ 482. **That water potable by cattle and inhabitable by fish no excuse for pollution.**—That water of a stream remains potable by cattle and inhabitable by fish does not deprive a riparian proprietor of his right of action where the stream is fouled to his injury, such facts being immaterial except in mitigation of damages.[35]

§ 483. **Benefit to public; balancing conveniences.**—Ordinarily the law will not undertake to balance conveniences or estimate the difference between the injury sustained by the plaintiff, and the loss that may result to defendant from having its trade or business found to be a nuisance, no one has the right to create a nuisance by erecting works and then say that he has expended large sums of money by such erection and that the neighboring property is of little value,[36] and, although the thing complained of, may upon the whole furnish a greater convenience to the public than it takes away this will be no answer to an indictment therefor.[37] Again, it is no justification on an indictment for a nuisance in the obstruction of a navigable river, that the benefit derived from the erection, which creates the nuisance, to a certain portion of the public, is greater than and counter-balances the injury done to another portion by the obstruction of the navigation. Semble, however, that if the injury be done, and that benefit accrue to the same portion or body of the public, it is for the jury

34. The Weston Paper Co. v. Pope, 155 Ind. 394, 56 L. R. A. 899, 57 N. E. 719.

35. Watson v. New Milford, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167.

36. Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 282, 9 L. R. A. 737, 20 Atl. 900, 25 Am. St. Rep. 595; Respublica v. Caldwell, 1 Dall (U. S.) 150; Seacord v. People, 121 Ill. 623, 13 N. E. 194, aff'g 22 Ill. App. 279; State v. Kaster, 35 Iowa, 221; People v. Horton, 5 Hun (N. Y.) 516; Smith v. Phillips, 8 Phila. (Pa.) 10.

37. Seacord v. People, 121 Ill. 623, 13 N. E. 194, 10 West Rep. 915.

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in the interest of society or necessi

38. Rex V. Ward, 4 A. & E. 384, 6 N. & M. 38, 1 H. & W. 703, 5 L. J. K. B. 221.

39. Bowman v. Humphrey, 124 Iowa 744, 100 N. W. 854.

40. Bentley v. Empire Portland Cement Co. (Supreme Ct.), 48 Misc. (N. Y.) 457, per Andrews, J.

public health.[44] Again, upon the trial of an indictment for a nuisance in a navigable river by erecting staiths there for loading ships with coals, the jury were directed to acquit the defendant if they thought that the abridgement of the right of passage occasioned by the erections was for a public purpose and produced a public benefit, and if the erections were in a reasonable situation, and a reasonable space was left for the passage of vessels on the river, and the judge pointed out to the jury that by means of the staiths coals were supplied at a cheaper rate and in a better condition than they would otherwise be, which was a public benefit. It was held that this decision was proper.[45]

§ 484. **Same subject.**—Notwithstanding the preceding decisions there are many cases which assert a different rule, especially in equity. Thus, it is declared in an English case, that in cases where important public interests are involved such as the improvement of the drainage of a town, the court will protect the private rights of the individual if affected in any material degree, but it will at the same time have regard to the nature and extent of the injury or nuisance and to the balance of inconveniences.[46] It is also said that courts of equity will be less inclined to interfere where the apprehended mischief to follow from the alleged nuisance has a tendency to promote public convenience.[47] So in North Carolina in case of a private nuisance in the erection of a mill or pond which is a public convenience, a court of chancery will not interfere where there is nothing to show that there is so great a disproportion between the private suffering and the public convenience as would authorize such interference.[48] And, under an Alabama decision, in determining whether an injunction will be issued, the court will take notice that while an invasion of private

44. Seacord v. People, 121 Ill. 623, 636, 13 N. E. 194, so holding in case of business of rendering dead animals.

45. Rex. v. Russell, 6 B. & C. 566, 1 D. & R. 566, 5 L. J. (O. S.) M. C. 80, 30 R. R. 432. Contra, Atty-Gen. v. Terry, L. R. 9 Ch. 423, 30 L. T. 215, 22 W. R. 395.

46. Lillywhite v. Trimmer, 36 L. J. Ch. 525, 15 W. R. 763, 16 L. T. 318.

47. Clifton Iron Co. v. Dye, 87 Ala. 468, 470, 6 So. 192; Robinson v. Baugh, 21 Mich. 290.

48. Bradsher v. Lea's Heirs, 38 N. C. 301, 305.

rights may produce injury entitling the owner to redress, yet that great public interests and benefits will accrue from the acts alleged to be a nuisance.[49] It is also declared that courts of equity will be less inclined to interfere where the apprehended mischief to follow from the alleged nuisance has a tendency to promote public convenience.[50] In another decision it is held that in determining upon the propriety of injunctive relief against private nuisances, the court will be influenced against ordering an abatement by the facts that the structures from which the nuisance arises is useful to the defendant and the public, and the injury to the plaintiff trifling.[51] So in Illinois if the benefit exceeds damages, it is held that no recovery can be had.[52] Again, it is declared that " it is not every case of nuisance or continuing trespass, which a court of equity will restrain by injunction. In determining this question, the court should weigh the injury that may accrue to one or the other party, and also to the public, by granting or refusing the injunction." [53] Under a West Virginia decision if the alleged nuisance is of a public character the court will consider the injuries which may result to the public by granting the injunction as well as the injuries to be sustained by plaintiff in refusing it. And when the public benefit outweighs the private inconvenience, an injunction will not be granted.[54] So in a New Jersey case an injunction will not be granted where injury is slight, compared to inconvenience to public and defendant by granting injunction.[55] Again, where the erection of a public mill is demanded by the necessities and

49. Clifton Iron Co. v. Dye, 87 Ala. 468, 6 So. 192.

50. Harrison v. Brooks, 20 Ga. 537, 544; Robinson v. Baugh, 31 Mich. 290; Barnes v. Calhoun, 37 N. C. 199, 201. See Amelia Milling Co. v. Tennessee Coal, I. & R. Co., 123 Fed. 811; People v. Horton, 64 N. Y. 10, aff'g 5 Hun, 516 Daughtry v. Warren, 85 N. C. 136; Foster v. Norton, 2 Ohio Dec. 390; Wees v. Coal & Iron R. Co., 54 W. Va. 421, 46 S. E. 166.

51. Brown v. Carolina Cent. Ry. Co., 83 N. C. 128.

52. Chicago Forge & Bolt Co. v. Sanche, 35 Ill. App. 174.

53. Clifton Iron Co. v. Dye, 87 Ala. 468, 470, 471, 6 S. 192.

54. Mees v. Coal & Iron Railway Co., 54 W. Va. 421, 430, 46 S. E. 166, citing 1 Spelling on Injunctions, § 417.

55. Higbee & Riggs v. Camden & Amboy Rd. & Transp. Co., 20 N. J. Eq. 435. See, also, Morris & Essex Rd. Co. v. Prudden, 20 N. J. Eq. 530, 537.

convenience of the public, and will materially conduce to the advantage of the owner of the mill-seat, the possible result of some small and uncertain injuries to two of the adjacent proprietors of land, by overflowing it, and slightly affecting the health of their families, was not deemed by the court a sufficient ground to interfere by injunction to prevent the work, especially as those proprietors would have a remedy at law if their fears should be realized.[56]

§ 485. **Acquiescence, knowledge or failure to complain—Laches estoppel.**—To constitute acquiescence a party must have been aware of all the facts and circumstances and have had opportunity after being possessed of all the facts and circumstances to exercise his judgment and to assent and must have intended to do so.[57]

56. Wilder v. Strickland, 55 N. C. (2 Jones Eq.) 386.

57. Barkan v. Knecht, 10 Wkly. Law, Bull 342.

When acquiescence, knowledge or failure to complain no defense or estoppel. See Indianapolis Water Co. v. American Strawboard Co. (C. C. D. Ind.) 57 Fed. Rep. 1000; Town of Union Springs v. Jones, 58 Ala. 654; Jacob v. Day, 111 Cal. 571, 44 Pac. 243; Learned v. Castle, 78 Cal. 454, 18 Pac. 872, 21 Pac. 11; Dwight v. Hayes, 150 Ill. 273, 37 N. E. 218, 41 Am. St. Rep. 367, aff'g 49 Ill. App. 530; Laflin & R. Powder Co. v. Tearney, 131 Ill. 322, 21 N. E. 516, 7 L. R. A. 262, 23 N. E. 389, aff'g 30 Ill. App. 321, 19 Am. St. Rep. 34; West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N. E. 879; Fossen v. Clark, 113 Iowa, 86, 84 N. W. 989, 52 L. R. A. 279; Corley v. Lancaster, 81 Ky. 171; O'Brien v. City of St. Paul, 18 Minn. 176 (Gil. 163); Schumacher v. Shawhan, 93 Mo. App. 573, 67 S. W. 717; Thomas v. Concordia Cannery Co., 68 Mo. App. 350; Chapman v. Rochester, 110 N. Y. 273, 18 N. Y. St. R. 133, 18 N. E. 88; Leonard v. Spencer, 108 N. Y. 338, 15 N. E. 397; Adams v. Popham, 76 N. Y. 410; Carter v. New York El. R. Co., 14 N. Y. St. Rep. 859; Bolton v. New Rochelle, 84 Hun, 281, 32 N. Y. Supp. 442; Vick v. City of Rochester, 46 Hun (N. Y.), 607; Cilly v. City of Cincinnati, 7 Ohio Dec. Reprint, 344; McClung v. North Bend Coal & C. Co., 31 Ohio L. J. 9; Alexander v. Kerr, 2 Rawle (Pa.) 83, 19 Am. Dec. 616; Smith v. Phillips, 8 Phila. 10; Bert v. Smith, 3 Phila. (Pa.) 363; Pilcher v. Hart, 1 Humph. (Tenn.) 524; Pfleger v. Groth, 103 Wis. 104, 79 N. W. 19; Fogarty v. Junction City Pressed Brick Co., 50 Kan. 478, 18 L. R. A. 756, 31 Pac. 1052. *Examine* Schewrich v. Southwest Missouri Light Co., 109 Mo. App. 406, 84 S. W. 1003; Smith v. City of Auburn, 88 App. Div. 396, 84 N. Y. Supp. 725; Hieskell v. Gross, 3 Brewst. 430; Warren

Again, the fact that when one purchased land he knew of the existence thereon of a nuisance consisting of a discharge thereon of refuse from a neighboring creamery, under an alleged easement, would not estop him from maintaining proceedings to abate the nuisance.[58] And a riparian owner who donated straw to induce the contruction of a strawboard plant and stood by while a large sum of money was expended in its erection, without knowledge or notice that in the operation of the plant the waters of a stream would be unlawfully corrupted to a public nuisance thereby created, is not precluded from asserting a claim for damages for injury to his property and for an injunction.[59] So it is held that delay in instituting suit and failure to complain is not a defense when such delay is short of the statutory period of limitations.[60] And the delay of fourteen years from the commencement of the nuisance to the filing of the information would be no bar to the

v. Hunter, 1 Phila, (Pa.) 414. See Bankhart v. Houghton, 27 Beav. 425.

Laches. When delay in suing no bar to relief. Water Lot Co. v. Jones, 30 Ga. 944; West Arlington Imp. Co. v. Mount Hope Retreat, 97 Me. 191, 54 Atl. 982; Mueller v. Fruen, 36 Minn. 273, 30 N. W. 886; Carlisle v. Cooper, 21 N. J. Eq. 576; Alexander v. Kerr, 2 Rawle (Pa.) 83, 19 Am. Dec. 616; Lonsdale Co. v. Cook (R. I. 1899), 44 Atl. 929; Francklyn v. People's Heat & L. Co. (Carr.), 32 N. S. 44.

When acquiescence, knowledge or laches is a bar or estoppel. Whaley v. Wilson, 112 Ala. 627, 20 So. 922; Platte & D. Ditch Co. v. Anderson, 8 Colo. 131, 6 Pac. 515; Pierce v. German Savings & Loan Soc., 72 Cal. 180, 13 Pac. 478, 1 Am. St. Rep. 45; Fenter v. Toledo, St. L. & K. C. R. Co., 29 Ill. App. 250; Jordan v. Helwig, 1 Wils. (Ind.) 447; Chaffee v. Telephone & Teleg. Co., 6 L. R. A. 455, 77 Mich. 625, 43 N. W. 1064; Wilmarth v. Woodcock, 66 Mich. 331, 33 N. W. 400; Bassett v. Salisbury Mfg. Co., 47 N. H. 426; Sprague v. Steere, 1 R. I. 247; Madison v. Ducktown Sulphur Copper Iron Co., 113 Tenn. 331, 83 S. W. 658; Caldwell v. Knott, 18 Tenn. (10 Yerg.) 209; Pettibone v. Burton, 20 Vt. 302; Examine Clifford Iron Co. v. Dye, 87 Ala. 468, 6 South 192; River Ribble Joint Committee v. Croston Urban Dist. Council (1897), 1 Q. B. 251.

Intention does not affect, See § 94 herein.

58. Van Vossen v. Clark, 113 Iowa 86, 52 L. R. A. 279, 84 N. W. 989.

59. The Weston Paper Co. v. Pope, 155 Ind. 395, 56 L. R. A. 899, 57 N. E. 719.

60. West Muncie Strawboard Co. v. Slack, 164 Ind. 21, 72 N. E. 879.

61. Atty-General v. Colney Hatch Lunatic Asylum, 38 L. J. Ch. 265, L. R. 4 Ch. 146, 19 L. T. 708, 17 W. R. 240.

relief, but at all events, where the time had been occupied in negotiations and attempts to remove the nuisance, the delay was immaterial.[61] So it is held that although the plaintiff has submitted to the injury for nearly four years, trusting to the assurance of the council that they were carrying out a scheme of sewage by which eventually the evil would be removed, he was not precluded on the ground of laches from now applying for an injunction, the rule in such cases being that the mere prospect of injury does not give a right to this relief.[62] So a hospital not being a nuisance *per se,* one injured thereby is not guilty of laches in not bringing suit before it is opened and in waiting five months and seven days thereafter; it appearing that the operation of the place as a home was at first not offensive, that plaintiff was not familiar with the operations of a hospital; that complaint was made to defendant before suit was brought, and that it was obvious that the purpose of opening a hospital would not have been abandoned if requested. Plaintiff, in such a case, had a right to wait till fully advised of its ill effects upon herself and her property before bringing suit.[63]

§ 486. **Other instances of defenses generally.**—It is no defense that the nuisancer may be held liable to others.[64] And one who receives actual damages from a nuisance may maintain a private action, even though there may be many others in the same situation.[65] So the fact that several landowners as well as the plaintiff sustain damage by the waters of a stream which flows through

When statute of limitations is no defense to a bill to abate a public nuisance. Weiss v. Taylor (Ala. 1905), 39 So. 519.

When statute limitations commences to run. When no bar. See Daneri v. Southern California R. Co., 122 Cal. 507, 55 Pac. 243; Powers v. Council Bluffs, 45 Iowa 652, 24 Am. Rep. 792; Howard County v. Chicago & A. R. Co., 130 Mo. 652, 32 S. W. 651; Ridley v. Seaboard & R. R. Co., 124 N. C. 34, 32 S. E. 325; Henry v. Ohio River R. Co., 40 W. Va. 234, 21 S. E. 863.

62. Atty-General v. Council of Borough of Birmingham, 4 Kay & J. 528, 6 W. R. 811.

63. Deaconess Home & Hospital v. Bontjes, 104 Ill. App. 484, 493, aff'd 207 Ill. 553, 561, 69 N. E. 748.

64. City of Durango v. Chapman, 27 Colo. 169, 60 Pac. 635.

65. Wylie v. Elwood, 134 Ill. 281, 25 N. E. 570, 9 L. R. A. 726, 23 Am. St. Rep. 673; Cooley v. Lancaster, 81 Ky. 171; Francis v. Schoelkopf, 53 N. Y. 152; Lansing v. Smith, 4 Wend. (N. Y.), 25. Examine Crane Co. v. Stammers, 83 Ill. App. 329.

their premises, being polluted, such damage differing in degree, does not make such pollution a public nuisance.[66] And the creator of a public nuisance consisting of noise and loud cries may be liable even though those of the public then present suffered no annoyance.[67] Nor is it any defense that the nuisance is a public one;[68] and in an action on the case for diverting water from the plaintiff's mill, it is no defense that the mill stands within the limits of tide waters, and is therefore a public nuisance.[69] Nor is it a defense that besetting and watching laborers was merely for peaceful persuasion;[70] nor that one who is injured in his property rights does not live on the property;[71] nor that accused acted upon his attorney's advice;[72] nor that the nuisance was created in order to abate or remedy another nuisance;[73] nor that values are increased by the nuisance;[74] and it is, as a matter of law, no answer to a nuisance to another's right that the creator of the nuisance had before done the injured party a benefit, the acts of nuisance and the benefit being separate and distinct. The law in the matter of nuisance has no set-off or recoupment.[75] Again, it is no defense that a city's acts in creating the nuisance were *ultra vires;*[76] nor that expense would be incurred in removing the nuisance;[77] nor that plaintiff's structure is partly upon a public highway, the street having been inaccurately surveyed;[78] Nor that accused

66. Smith v. City of Sedalia, 152 Mo. 283, 48 L. R. A. 711, 53 S. W. 907.

67. Commonwealth v. Harris, 101 Mass. 29.

68. Haller v. Pine, 8 Blackf. (Ind.), 175, 44 Am. Dec. 762; Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 45 Am. St. Rep. 894, 57 Am. & Eng. R. Cas. 694, 19 S. E. 521, 23 L. R. A. 674.

69. Simpson v. Seavey, 8 Greenlf. (Me.), 138, 22 Am. Dec. 228.

70. Lyons v. Wilkins (1899), 1 Ch. 255, 68 L. J. Ch. 146, 63 J. P. 339, 79 Law T. N. S. 709, 47 W. R. 291.

71. Weakley v. Page (Tenn.), 53 S. W. 551.

72. Skinner v. State, (Tex. Civ. App.), 65 S. W. 1073.

73. Western & A. R. Co. v. Cox, 93 Ga. 561, 30 S. E. 68; Seacord v. People, 22 Ill. App. 194. aff'd 121 Ill. 623, 13 N. E. 194, 10 W. Rep. 915.

74. Francis v. Schoelkopf, 53 N. Y. 153; Wesson v. Washburn Iron Co., 13 Allen (Mass.) 95, 45 Am. Dec. 181.

75. Talbot v. Whipple, 7 Gray (Mass.) 122, 124.

76. Pettit v. Grand Junction, Greene County, 119 Iowa 352, 93 N. W. 381.

77. Faulkenbury v. Wells, (Tex. Civ. App.) 68 S. W. 327.

78. Houston & Great Northern R. Co. v. Parker, 50 Tex. 333.

merely acted as agent of a non-resident;[79] nor that one who obstructs a public highway believed his boundary line extended into the road;[80] nor in a prosecution for pollution of waters, the failure of a city to provide proper drainage facilities;[81] nor is the fact that plaintiff might possibly have avoided the injury or have abated the nuisance a defense.[82] But the testimony of a civil engineer that a couple of culverts through the defendant's embankment would help materially in draining the land is held admissible for the purpose of showing one of the means by which the appellant could have avoided the injury complained of.[83] A nuisance will not, it is decided, be enjoined after it has been voluntarily abated,[84] and an intention to discontinue or remedy the nuisance coupled with acts evidencing such intention is material in this connection.[85] So in an English case a bill was filed to restrain a local

79. State v. Bell, 5 Port. (Ala.) 365.

80. Skinner v. State, (Tex. Civ. App.) 65 S. W 1073. Examine Smith v. Glenn, 129 Cal. XVIII, 62 Pac. 180; Grace v. Walker, 95 Tex. 39, 64 S. W. 930; 61 S. W. 1103; 65 S. W. 482.

81. Mergentheim v. State, 107 Ind. 567, 8 N. E. 568.

82. Crommelin v. Coxe, 30 Ala. 318, 68 Am. Dec. 120; White v. Chapin, 102 Mass. 138; Stevenson v. Ebervale Coal Co., 203 Pa. 316, 52 Atl. 201; Masonic Temple Assoc. v. Banks, 94 Va. 695, 27 S. E. 490. See High Wycombe v. Conservators of River Thames (Q. B.), 78 Law T. Rep. 463. Compare Rosser v. Randolph, 7 Port. (Ala.) 238, 31 Am. Dec. 712.

83. Willitts v. Chicago, Burlington & Kansas City R. Co., 88 Iowa, 282, 21 L. R. A. 608, 55 N. W. 313.

Where nuisance can be avoided. See § 90 herein.

Where nuisance can be avoided. Noises, jars and vibrations. See § 187 herein.

84. Perry v. The Howe Co-operative Creamery Co., 125 Iowa, 415, 101 N. W. 150; Bennett v. National Starch Mfg. Co., 103 Iowa, 207, 72 N. W. 507; State v. Strickford, 70 N. H. 297, 47 Atl. 262; State v. Rhodes, 66 N. H. 39, 25 Atl. 588, 18 L. R. A., 646; Umscheid v. San Antonio (Tex. Civ. App.) 69 S. W. 496. Examine Sharp v. Arnold, 108 Iowa, 203, 78 N. W. 819; Trulock v. Merte, 72 Iowa 510, 34 N. W. 307; Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622, aff'g 74 N. Y. Supp. 1145; Amrhein v. Quaker City Dye Works, 192 Pa. 253, 43 Atl. 1008.

Where nuisance abated pendente lite. See § 91 herein.

85. Hughes v. General Electric Light & Power Co., 107 Ky. 485, 54 S. W. 723; Green v. Lake, 54 Wis. 540, 28 Am. Rep. 378; King v. Morris & E. R. Co., 18 N. J. Eq. 397; Bailey v. New York City, 78 N. Y. Supp. 210,

board of health from discharging sewage into their river so as to be a nuisance and injury to the plaintiff; the court, finding that the plaintiff sustained no material injury, and that the nuisance, if any, had been to a great extent abated since the filing of the bill, refused the injunction and dismissed the bill, but without costs, the plaintiff appearing to have had some justification for instituting the suit.[86]

§ 487. **Same subject.**—It is held that the court is not ousted of jurisdiction by such abatement or discontinuance of a nuisance;[87] and that jurisdiction may also be retained to award damages, though the nuisance is abated.[88] Again, it is no excuse that mining operations carried on in the ordinary manner will necessarily discolor or pollute waters of a stream by fine clay.[89] So even though drainage is necessary to the beneficial operation of a coal mine and it is properly performed it constitutes no defense where it occasions injury to a lower riparian proprietor by polluting waters of a stream.[90] So if refuse from a coal mine is cast into a stream and its descent is quickened by extraordinary floods so that it is deposited upon land of a lower riparian proprietor to his damage the mine owner is liable, nevertheless, where such refuse would be carried by ordinary currents of the stream; as the rule relieving the miner from liability does not apply in such a case as to a case of refuse deposited on a miner's own land and being washed down on another's land by extraordinary floods.[91]

38 Misc. 41; Umscheid v. San Antonio, (Tex. Civ. App.) 69 S. W. 496. Compare Ingersoll v. Rousseau, 35 Wash. 92, 76 Pac. 513.

86. Lillywhite v. Trimmer, 36 L. J. Ch. 525, 15 W. R. 763, 16 L. T. 318.

87. Tate v. Parrish, 7 T. B. Mon. (Ky.) 325; Rice v. Morehouse, 150 Mass. 482, 23 N. E. 229; Call v. Buttrick, 4 Cush (Mass.) 345; Thompson v. Behrmann, 37 N. J. Eq. 345; Sherer v. Hodgson, 3 Rawle (Pa.) 211; Smith v. Ingersoll-Sergeant Rock Drill Co., 27 N. Y. Supp. 907, 7 Misc. 374; Heather v. Hearn, 5 N. Y. Supp. 85; Peck v. Elder, 3 Sandf. (N. Y.) 126; Chester v. Smelting Corp., 85 Law T. 67.

88. McCarthy v. Gaston Ridge Mill & Min. Co., 144 Cal. 542, 78 Pac. 7; Moon v. National Wall Plaster Co., 66 N. Y. Supp. 33, 31 Misc. 631, aff'd 57 N. Y. App. Div. 621, 67 N. Y. Supp. 1140.

89. Beach v. Sterling Iron & Z. Co., 54 N. J. Eq. 65, 33 Atl. 286.

90. Hunter v. Taylor Coal Co., 16 Ky. L. Rep. 190.

91. Elder v. Lykens Valley Coal

And if deposits are made intentionally by a mining company upon its own property and under such conditions that they wash down into waters of a stream and upon lands of another and such result might reasonably have been foreseen, the company will be held liable for the damage sustained, even though the company had no other suitable place for such deposits.[92] Necessity is held to constitute no defense;[93] nor does profitableness of a nuisance prevent equitable relief;[94] and mistake of law is no defense;[95] nor does a license to keep a place justify making it a nuisance;[95a] and the fact that city officials tolerate the maintenance of bawdy houses is no defense to an action to abate the same as a nuisance specially injurious to adjoining property.[96] So a mere parol consent for the pollution of a stream or the creation of a nuisance vests no right not capable of revocation at any time.[97] But citizens who have made connections between their residence and a sewer in conformity with a city ordinance cannot be enjoined and should not be made parties to a suit brought against a city by a private person injured by the deposit of such sewage.[98] Where a cement

Co., 157 Pa. 490, 24 Pitts. L. J. N. S. 195, 33 W. N. C. 333, 27 Atl. 545.

92. Columbus & H. Coal & I. Co. v. Tucker, 48 Ohio St. 528, 26 N. E. 630, 12 L. R. A. 577, 43 Alb. L. J. 289, 25 Ohio L. J. 105.

93. Cushing v. Board of Health of Buffalo, 13 N. Y. St. R. 783; Haughs Appeal, 102 Pa. 42, 48 Am. Rep. 193.

That business lawful or use necessary may be immaterial. Loading and unloading goods. Highways. See § 224 herein.

94. Redd v. Edna Cotton Mills, 136 N. C. 342, 67 L. R. A. 983, 48 S. E. 761.

95. State v. Gifford, 111 Iowa, 706, 82 N. W. 1034. (Liquor nuisance.)

95a. State v. Tabler, 34 Ind. App. 393, 72 N. E. 1039; Koehl v. Schoenhausen, 47 La. Ann. 1316, 17 So. 809; Givens v. Van Studdiford, 86 Mo. 149, 56 Am. Rep. 421; State v. Morehead, 22 R. I. 272, 47 Atl. 545; State v. McGahan, 48 W. Va. 438, 37 S. E. 573.

Effect of license. See § 232 herein. Compare Dorrance v. Simons, 2 Root (Conn.) 208; Commonwealth v. Greybill, 17 Pa. Super. Ct. 514. See Reaves v. Territory, 13 Okl. 396, 74 Pac. 951.

96. Ingersoll v. Rousseau, 35 Wash. 72, 76 Pac. 713.

97. City of Kewanee v. Otley, 204 Ill. 402, 413, 68 N. E. 388.

98. Carmichael v. Texarkana, 94 Fed. 561.

As to authorized nuisance. See De Give v. Seltzer, 64 Ga. 423; Sammons v. Gloversville, 175 N. Y. 346, 67 N. E. 622, 74 N. Y. Supp. 1145; Miller v. Burch, 32 Tex. 208, 5 Am. Rep. 242; People v. Crounse, 51 Hun, 489, 21 N. Y. St. R. 687.

plant is located in a sparsely settled community and the works as they are operated constitute a nuisance by infringing upon plaintiff's rights by a physical interference with her property, in casting upon it considerable dust and cinders, materially interfering with her enjoyment of it, and with her physical comfort, and lowering its rental value, the fact that the injury is occasional and the damages sustained are small, will, it is held, not justify granting a permanent injunction where great damage would be done to costly business works.[99] Again, a civil action to restrain the completion of piers as an alleged nuisance in a navigable stream is not barred by the trial and acquittal in a justice's court of the person charged with maintaining such nuisance.[100] And where a bill charged that the defendant's mill dam injured the health of the relators, an injunction was perpetuated; notwithstanding the defendant had been indicted for the same nuisance, on which there had been a mistrial, and although an indictment was still pending.[101] But a defense to an action for the diversion of water is good which alleges that the water was pumped out of the creek in question to defendant's ore washers and furnaces, and that the water so pumped, after passing through said washers, was returned to said creek through another creek; that no water so pumped was used except so far as necessary to operate defendant's plant, and that all of said water so used was used with due care to the rights of the lower riparian owner, and that there was no material diminution of the amount returned from that diverted, the same being used in a reasonable manner for such manufacturing purposes.[102] Under an English decision, the making of an

Legalized and statutory nuisances. See §§ 67-84 herein.

Where business legalized. See §§ 147, 185, 186 herein.

99. Bentley v. Empire Portland Cement Co. (Supreme Ct.), 48 Misc. (N. Y.) 457. See Ross v. Butler, 19 N. J. Eq. 294, 97 Am. Dec. 654; Casebeer v. Mowry, 55 Pa. 419, 93 Am. Dec. 766; Wilcox v. Henry, 35 Wash. 591, 77 Pac. 1055. See, also, §§ 13, 26 herein.

100. Small v. Harrington, 10 Idaho, 499, 79 Pac. 461.

101. Citizens of Raleigh v. Hunter, 16 N. C. (1 Dev. Eq.) 12. See State v. Brownrigg, 87 Me. 500, 33 Atl. 11; Story v. Hammond, 4 Ohio 376; State v. McGill, 65 Vt. 547, 27 Atl. 430.

102. Alabama Consolidated Coal & Iron Co. v. Turner (Ala., 1905), 39 So. 603.

order under section 10 of the Rivers Pollution Prevention Act, 1876, requiring a person to abstain from the commission of an offense against the provisions of that act, is discretionary, and such an order ought not, as a matter of discretion, to be made against a person who has offended against the act, on the application of another party who is also an offender against its provisions, and who, by means of such an order, is seeking to avoid the performance of duties imposed upon him by statute.[103] In an application for a provisional or preliminary injunction to restrain pollution of a stream, the defendant will not be restrained until he has been heard in his defense unless the facts alleged are full, sufficiently definite and clear in support of the right asserted.[104]

103. Kirkheaton Local Board v. Ainley, 61 C. J. Q. B. 812 (1892), 2 Q. B. 274, 67 L. T. 209, 41 W. R. 99, 57 J. P. 36.

104. Mayor & City Council of Baltimore v. Warren Mfg. Co., 59 Md. 96.

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DAMAGES.

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504. Damages—Pleading—General decisions.
505. Waiver of irregularities in taking land by accepting damages.

§ 488. **Damages generally.**—The question of damages has been considered at some length elsewhere herein,[1] and will therefore be only briefly discussed here. In determining the amount of damages recoverable a distinction must be made between those nuisances which cause a permanent injury and those which are of a non-permanent, abatable, or temporary nature. The ordinary rule in the former case is that depreciation in the value of the property, and in the latter case the depreciation in the usable or rental value of the property is the basis for admeasurement of damages. There may, however, be a recovery for particular injuries, even in addition to other damages proven. In certain cases the damages may be nominal; and exemplary or punitive damages may be awarded under certain circumstances. The cost of abatement or removal of the nuisance may also be awarded where the

1. See §§ 156, 170, 191, 211, 259, 306, 307, 329 herein.

facts so justify.[2] These questions and principles are determined and maintained under the decisions in the next following sections.

§ 489. **Permanent injury — Depreciation in value—Rule—Instances.**—Where a nuisance causes a permanent injury to property, the general rule is that the measure of damages will be the depreciation in the value of the property, that is, the difference between its value before and after the injury.[3] So where by the construction and maintenance of a pool of water near plaintiff's land, a nuisance is created, and his land damaged thereby, his measure of damages is the difference in the value of the property before the injury and its value immediately thereafter.[4] So for permanent injury to land, the value of which is destroyed for agricultural purposes by the deposit of refuse and poisonous substances on the surface, the damages recoverable are the difference between the value of the land prior to the injury and its value after the injury.[5] And the difference in the value of property occasioned by the operation of gas or other offensive works is a proper factor to be consid-

2. See Joyce on Damages, § 2149 et seq.

Estimation of damages by jury. "If from the evidence in this case, and under the instructions of the court, the jury shall find the issues for the plaintiff, and that the plaintiff has sustained damages as charged in her declaration, then, to enable the jury to estimate the amount of such damages, it is not necessary that any witness should have expressed an opinion as to the amount of such damages, but the jury may themselves make such estimate from the facts and circumstances in proof, and by considering them in connection with their own knowledge, observation and experience in the business affairs of life." This instruction is the law, and has been frequently so held by this and the Supreme Court. It points out the only method that could be adopted for assessment of damages in this kind of a case. City of Litchfield v. Whitenack, 78 Ill. App. 366.

3. Joyce on Damages, § 2150. Examine Johnson v. Porter, 42 Conn. 234; Cunningham v. Stein, 109 Ill. 375; Givens v. Von Studdiford, 86 Mo. 149, 56 Am. Rep. 421, 4 Mo. App. 498; Hentz v. Mt. Vernon, 78 N. Y. App. Div. 515, 79 N. Y. Supp. 774; Garrett v. Wood, 55 N. Y. App. Div. 281, 67 N. Y. Supp. 122; City of Mansfield v. Hunt, 19 Ohio Cir. Ct. R. 488, 10 O. C. D. 567; Daniel v. Ft. Worth & R. G. R. Co., 96 Tex. 327, 72 S. W. 578.

4. Missouri, Kansas & Tex. Ry. Co. v. Dennis (Tex. Civ. App., 1905), 84 S. W. 860.

5. Watson v. Colusa-Parrot Mining & Smelting Co. (Mont., 1905), 79 Pac. 14.

ered.[6] Again, where damages are sought for maintaining a nuisance, by reason of the construction of a sewer over plaintiff's premises and the creation of a reservoir or pool therein, into which large quantities of offensive, foul, and noxious matter is alleged to be discharged, creating noxious odors, etc., and interfering with building foundations, the measure of damages, if any, would be the depreciation in the value of the property where it is averred to be unfit for use; and it is error in such case to admit the question, "What was the damage sustained by reason of that sewer?" and the answer, "I would put the damage at one thousand dollars," it appearing that benefits and damages had been assessed to plaintiff's property, so that if he was aggrieved in such assessment he should look to the proper statutory remedy.[7] In an action to recover for the diminished enjoyment and value of property by reason of an alleged nuisance, a distinction exists between damages resulting from the diminished value of land where an intended sale is defeated because of a nuisance and damages resulting from the diminished enjoyment of the property by reason of the same nuisance, and in the absence of any loss of sale the only question that remains is the extent to which one has been deprived of the enjoyment of his land, and the value of the property may be considered in ascertaining the damages caused by such diminished enjoyment, and the jury must estimate the damage on the basis of such value without resorting to the rate of interest as a basis, that is, interest on the diminution of value.[8] But in an action to abate a nuisance, a cream of tartar works, near dwelling houses alleged to have been made uncomfortable and unfit for habitation, etc., depreciation in the value of the property is inadmissible evidence upon the question of damages.[9]

§ 490. **Usable value—Diminished rental value.**—In an action at law to recover damages for a nuisance the measure of damages is the difference in rental value of the property before the com-

6. Ottawa Gas Light & Coke Co. v. Graham, 28 Ill. 73, 81 Am. Dec. 263.

7. City of Huntington v. Stemeh (Ind. App., 1906), 77 N. E. 407.

8. Moore v. Langdon, 6 Mackey (D. C.) 6.

9. Meek v. De Latour (Cal., 1905), 83 Pac. 300.

mencement of the nuisance and afterwards during its existence, down to the time of the commencement of the action, the reason of the rule being that the action at law being for the recovery of money only, a judgment therein cannot operate as a bar to an action in equity for injunctive relief, nor to successive future actions for damages.[10] So depreciation in rental value during the maintenance of a nuisance down to the commencement of the suit is the measure of damages where the nuisance is temporary.[11] And in Alabama diminished rental value may be recovered.[12] So the rental value of land may be recovered as damages for flooding land through a continuing injury.[13] So in Georgia evidence of depreciation in rental value is admissible to show damage to property occasioned by a pool of stagnant water in a city.[14] And the owner of a dwelling house which he himself occupies is entitled to just compensation for the discomfort and annoyance occasioned by the maintenance by another of a nuisance on adjoining premises; and in fixing the amount of damages in such case proof of depreciation in the rental value of the house furnishes a proper guide for determining the extent of the annoyance and discomfort.[15] In Iowa the measure of damages for a continuing nuisance is ordinarily the loss in the use of the land caused thereby, and such special damage as may result therefrom, and not the depreciation of the market value of the land, for the nuisance may be abated

10. Van Veghten v. Hudson River Power Co., 92 N. Y. Supp. 956, 958, per Chester, J., relying upon Uline v. New York C. & H. R. R. Co., 101 N. Y. 98, 54 Am. Rep. 661, 4 N. E. 536.

When lessors and not lessees entitled to damages. Where a nuisance injurious to property when it existed when it was leased and the probability exists that less rent was for that reason paid therefore by the lessees the lessors and not the lessees are entitled to the damages resulting from such nuisance. Dumois v. Hill, 2 N. Y. App. Div. 525, 37 N. Y. Supp. 1093, 74 N. Y. St. R. 274, aff'g 11 Misc. 242, 65 N. Y. St. R. 305, 32 N. Y. Supp. 164, and aff'd 157 N. Y. 718.

11. Shively v. Cedar Rapids, Iowa Falls & N. W. R. Co., 74 Iowa 169, 7 Am. St. Rep. 471, 37 N. W. 133.

12. City of Eufaula v. Simmons, 86 Ala. 575, 6 S. 47.

13. Atchison, Topeka & Santa Fe Ry. Co. v. Jones, 110 Ill App. 626.

14. Savannah, Florida & Western Ry. Co. v. Parrish, 117 Ga. 893, 45 S. E. 280.

15. Swift v. Broyles, 115 Ga. 885, 42 S. E. 277.

some time.[16] Under an Ohio decision where the nuisance is of such a character as can be removed by removing its cause, or one for the continuance of which a second or third action may be brought, or one which is abatable and not permanent, the measure of damages is the amount that the owner is injured in its use; and the rule that the measure of damages is the difference between the market value of the land before and after the occurrence of the injury does not apply.[17] So where a sewage disposal plant constitutes a nuisance, such plant being near to plaintiff's residence and boarding house, depreciating the rental value thereof, the measure of damages is the difference between the rental value of plaintiff's property prior to the erection and maintenance of such disposal works and its value after they were erected.[18] Again, a plaintiff, who was a tenant and kept a boarding house, was injured by a nuisance, which consisted of vibrations, noises, smoke and gases resulting from an electric light plant immediately in the rear of her premises, has her election to have her damages measured by the depreciation in rental value of the premises as a whole, or by a loss in the usable value of the premises, and the same rule would apply to the owner of the premises.[19] If an action is brought by the occupants of premises as occupants, by the persons in possession who have in fact suffered injury and upon the proven facts there is a sufficient foundation for a verdict, then the jury may award damages as in their discretion they may deem proper; but where the action is brought not by the plaintiffs in their relation as occupants and sufferers, but as owners of the premises rented, the measure of damages would be whatever injuries they have sustained as owners, in the diminution of rents, in the failure to rent the same, for injury to property or for the cost of repairs, and only such damages as are proven can they as owners recover. The authorities which recognize this distinction are numerous.[20] Under

16. Vogt v. City of Grinnell, 123 Iowa 332, 98 N. W. 782.

17. Stroth Brewing Co. v. Schmitt, 25 Ohio Cir. Ct. R. 231.

18. Gerow v. Village of Liberty, 106 N. Y. App. Div. 357.

19. Hoffman v. Edison Electric Illuminating Co. of N. Y., 87 N. Y. App. Div. 371. (Action for damages.)

20. Dieringer v. Wehrman, 12 Wkly. Law Bull. (Ohio) 222, per Smith, J., citing Frank v. New Orleans & Carrolton Rd. Co., 20 La. Ann. 25; Pike & Co. v. Doyle, 19 La. Ann. 362; Worcester v. Great Falls

an Iowa decision it is declared that the test is not the value of the use of property when not devoted to any use whatever, but when occupied for the purposes for which the property is suitable in its then condition. And where one intends to erect buildings on the property, it is not the value to him for that purpose, but the value of the use of which he has been deprived by the nuisance or obstructions generally that constitute the measure of damages. So where the rental value with the obstructions existing is very little but without the nuisance it would be of some value, an action can be sustained.[21] As to a nuisance capable of abatement, the depreciation of the value of the property can have no applicability. The settled rule of damages in such cases is the difference in rental value with and without the nuisance.[22]

§ 491. **Usable or rental value continued — Decisions.** — In an action to recover damages for the maintenance of a nuisance in operating an electric plant, in which the complaint alleged, the fouling of plaintiff's hotel and the injury of the furniture by great quantities of soot, cinders, etc., escaping from the defendant's premises and pervading those of the plaintiff, in which evidence was given to sustain such allegation, the court may properly refuse to charge a requested instruction, that the measure of damages is the actual diminiution in rental value by reason of defendant's acts. And where there is evidence showing depreciation in the rent of the rooms in the hotel, which was competent as bearing upon the question as to whether there was a diminution in the rental value of the whole premises, a request to charge that

Mfg. Co., 41 Me. 159, 66 Am. Dec. 217; Emory v. Lowell, 109 Mass. 197; Jutte v. Hughes, 67 N. Y. 267; Francis v. Schwellkopf, 53 N. Y. 155; Wood on Nuisance, § 853.

21. Pettit v. Incorporated Town of Grand Junction, Greene County, 119 Iowa, 352, 93 N. W. 381.

22. City of San Antonio v. Mackey's Est., 22 Tex. Civ. App. 145, 54 S. W. 33 (Deposit of garbage and refuse matter on land.)

In addition to depreciation of rental value there is authority to the effect that the owner of land is not entitled to recover because of a prejudice which exists against the property by reason of a nuisance, even in a case where it is a permanent one. City of San Antonio v. Mackey's Est., 22 Tex. Civ. App. 145, 54 S. W. 33, per Fey, J. (Deposit of garbage and refuse matter on land.)

"loss of income from business is not provable as an element of damages," is properly refused. As to the first request, however, the court said: "This request undoubtedly states the general rule, and the diminution in rental is one of the items of damages applicable to this case. But the trouble with the request is that it is not the only item of damage applicable, . . . While diminution in rental value becomes an item of damages which the jury might award, in this case there has been alleged and evidence given tending to prove other independent items of damages not covered by the diminution in rental value of the premises," and as to the second request it was said: "There may be a loss of income and at the same time an equal lessening of the expenses of the business, so that the real profits would remain the same. This request, therefore, does not present the question as to whether the loss in net profits from a business is provable as an item of damages. In this case the rent of rooms or apartments in an hotel was a part of the business in which the plaintiff was engaged. We think that the evidence showing depreciation in the rent of the rooms in the hotel from year to year was competent as bearing upon the question as to whether there was a diminution in the rental value of the whole premises, and that the request to charge under the circumstances was properly refused."[23] In a recent Indiana case, it is held that in an action for damages for the pollution of a stream, where it is apparent that the theory of the complaint, as tested by the general scope thereof, is to recover damages for injuries due to a cause of an impermanent nature or character or what, in other words, is attributable to a temporary nuisance, or one which may be abated, and such pollution of the stream constitutes a continued nuisance rather than a permanent injury to plaintiff's premises, the depreciation of the rental value is an essential element of the damages sustained. But depreciation or diminution of rental value of premises cannot be regarded in the nature of special damages, and, therefore, do not fall within the rule that such damages be particularly shown or stated in the complaint in order that evidence on the trial may be admitted to prove them, and the

23. Pritchard v. Edison Electric Illum. Co., 179 N. Y. 364, 72 N. E. 243, aff'g 92 App. Div. 178.

averments may sufficiently show that such damages naturally or necessarily accrued or resulted from defendant's wrongful acts, so that the plaintiff would be entitled to recover therefor, as where the averments disclose that by reason of poisonous acids, etc., which have been spread over plaintiff's lands by the polluted waters of the creek in controversy, and that grass and other crops will not grow thereon, and that the lands have, to a great extent, been rendered unfit for agricultural purposes and the raising of stock. "Diminution of the rental value of land and the loss of some particular rent or rents are not virtually of the same character or nature and must not be confused with each other on the question of alleging special damages in a pleading." And where the facts alleged show the pollution of a stream or creek, but they do not necessarily constitute a nuisance of a permanent character, but one that may be abated, the measure of damages is that loss or diminution of rental value of the premises occasioned during the time the nuisance is maintained to the commencement of the action.[24] Again, in an Iowa case the contention of defendant was that the court erred in permitting plaintiff to show the value of his property, both before and after the establishment of the nuisance, for the reason that the matters complained of were not permanent in character and could easily be ababated. Defendant also insisted that the trial court adhered to the wrong measure of damages both in the introduction of testimony and in its instructions. It was further claimed that the instructions given were not supported by the evidence and were improper, in any view of the case. A decree in equity had, on November 16th, 1901, been obtained by the same plaintiff for abatement of the nuisance pursuant to a set-

24. Muncie Pulp Co. v. Keesling (Ind., 1906), 76 N. E. 1002, citing as to the measure of damages, Swift v. Broyles, 115 Ga. 885, 58 L. R. A. 390, 42 S. E. 277; Muncie Pulp Co. v. Martin, 164 Ind. 30, 72 N. E. 882; Weston Paper Co. v. Pope, 155 Ind. 394, 56 L. R. A. 899, 57 N. E. 719; Indiana, B. & W. R. Co. v. Eberle, 110 Ind. 542, 11 N. E. 467; Shirley v. Cedar Rapids, I. F. & N. R. Co., 74 Iowa, 169, 37 N. W. 133, 7 Am. St. Rep. 471; Hoffman v. Flint & P. M. R. Co., 114 Mich. 316, 72 N. W. 167; Wallace v. Kansas City, etc., R. Co., 47 Mo. App. 491; Threatt v. Brewer Mining Co., 49 S. C. 95, 26 S. E. 970; Watts v. Norfolk & W. R. Co., 39 W. Va. 196, 23 L. R. A. 674, 19 S. E. 521, 45 Am. St. Rep. 894.

tlement and compromise, and during the trial the court, in ruling on an objection, remarked that he should instruct the jury that said decree constituted "settlement of all damages up to that time;" and in the first instruction it said that plaintiff, in order to recover, must show that since said 16th day of November, 1901, he had suffered the inconveniences and injuries complained of, or some of them, in consequence of defendants still maintaining the nuisance charged, and that if he had so shown, he would be entitled to such sum as would fully compensate him for all the damages he had sustained, and referring to the rule for the admeasurement of damages, said: (3) "If you find for the plaintiff the measure of his recovery, if any, is between the fair and reasonable value of the use of his home as it existed prior to the establishment of the alleged nuisance and after the premises were rendered offensive by the noxious odors from defendant's outbuildings, located on the adjoining lot, if you so find, together with such other and further sum as will reasonably compensate him for the inconvenience and discomfort which he has suffered, if any, in being deprived of his home by and in consequence of the continuance of the alleged nuisance. (4) If you find for the plaintiff, he will be entitled to recover damages for the loss sustained by him in the comfortable use and enjoyment of his home since November 16, 1901, and such further sum as in your judgment will compensate him for the inconvenience and discomfort suffered in the deprivation of the comfortable enjoyment of his homestead by himself and family during said period, to wit, November 16, 1901." The judgment was reversed and it was held that the measure of damages in an action for nuisance, not of a permanent character, is the difference in the value of the use of the property as it existed prior and subsequent to the nuisance; and the admission of evidence as to the difference in value of the property itself was error.[25]

§ 492. **Usable value—Rule in Bly case.** — The measure of damages, where a lessee of a building is injured by a nuisance, is the diminution in the usable value of the premises to the occupant

25. Holbrook v. Griffis, 127 Iowa, 505, 103 N. W. 479.

caused by the wrongful act, and by "usable value" is meant the value of the use of the premises to the occupant as distinct from the rental of the premises reserved in the lease by the owner to the tenant.[26] This rule was applied to a case where defendant erected a building and placed therein steam boilers, steam engines, steam pipes, dynamos, electrical machines, and other machinery for the purpose of generating electricity for lighting and other purposes, and the building which plaintiff leased and conducted as a boarding house was affected by the continual vibration caused by defendant's plant, it appearing that the chandeliers and windows continually shook and rattled; that the windows had to be plugged up; that such vibrations were continuous day and night; that atmospheric conditions were changed; that smoke and soot fell in the yard and came in the windows; that cinders and ashes damaged the curtains; and that plaintiff's receipts as a boarding house keeper constantly decreased.[27]

26. Bly v. Edison Electric Illuminating Co., 111 N. Y. App. Div. 170. See, also, Bates v. Holbrook, 89 N. Y. App. Div. 548, appeal dismissed 178 N. Y. 568.

27. Bly v. Edison Electric Illuminating Co., 111 N. Y. App. Div. 170. Ingraham, J., said in relation to prior trials of this case: "The nature of this action and the questions presented are stated in the opinion of this court (54 App. Div. 427) and in the Court of Appeals (172 N. Y. 1) upon a former appeal from a judgment in favor of the plaintiff. It seems that two actions were commenced; one in equity for an injunction to restrain the continuance of a nuisance, and the other at law to recover damages for the maintenance of the nuisance. The equity action having been brought on for trial, resulted in a judgment awarding plaintiff an injunction and $4,000 damages. From that judgment defendant appealed to this court, where the judgment was modified by reducing the amount of damage to six cents, and as thus modified affirmed. Upon appeal to the Court of Appeals the action of this court in reducing the damages was disapproved, but the judgment was reversed on account of an error of the trial justice and a new trial ordered. The plaintiff's lease of the premises having expired, these two actions were consolidated and tried as an action at law which resulted in a verdict for the plaintiff for $4,000 as the damages that she had sustained in consequence of the nuisance maintained by the defendant, and from that judgment the defendant now appeals. This court upon the former appeal affirmed the judgment of the court below in so far as it found that the defendant maintained a nuisance, and the finding of the jury to the same effect is, according to our former decision, sus-

§ 493. **Equity—Jury trial—Discontinuance of nuisance pendente lite—Rental value — Landlord and tenant — Rule in Miller case.**—In a late case in New York[28] it is decided that where an action is properly brought in equity the defendant is not entitled to a jury trial as of right, and from the statement of facts it is found that, as the plaintiffs were entitled to equitable relief when the action was commenced, the discontinuance of the nuisance would not prevent retaining the case and awarding damages. The important point of the case, however, is that which holds that the landlord cannot recover for any depreciation in rental value, occasioned by a nuisance, since a tenant, under a lease, made during the existence of a nuisance, is entitled to recover the depreciation of value of occupation of the premises, and the defendant cannot be subjected to a double recovery for the same injury. The case is, therefore, of sufficient importance to be given in full. The facts were as follows: "The plaintiffs by the institution of this action have sought to restrain the defendant from continuing a nuisance, created through the maintenance and operation of a plant for the supply of electric light and power, whereby their property in neighboring dwelling houses has been injuriously affected. They further demanded judgment for damages already sustained. The property was in the occupancy of a tenant holding under a lease by the plaintiffs. The trial court formulated its decision in findings of facts and conclusions of law, and the judgment recovered by the plaintiffs thereupon was affirmed by the appellate

tained by the evidence. . . . It follows that the judgment and order appealed from should be affirmed with costs."

The Bly case in 172 N. 1, which reversed 54 App. Div. 427, holds that a tenant in possession of premises affected by a nuisance under a lease made during the existence of the nuisance, can maintain an action to abate the nuisance and recover the damages sustained therefrom, as well as could the owner of premises who comes into a nuisance. The principal points upon which the reversal was based were the modification of the judgment as to damages by the Appellate Division and an oversight of the trial court as to the period for which plaintiff was entitled to recover damages.

28. Miller v. Edison Electric Illuminating Co., 184 N. Y. 17 (Advance Sheets No. 270, March 3, 1906) 62 Cent. Law J. 243, 32 National Corp. Rep. 268, rev'g 97 N. Y. App. Div. 638, which aff'd 66 N. Y. App. Div. 470, 73 N. Y. Supp. 376, which rev'd 33 Misc. 664, 68 N. Y. Supp. 90. See 78 App. Div. 390, 80 N. Y. Supp. 319.

division. The facts found, so far as they need to be mentioned, show that the plaintiffs became the owners of the premises in question some years prior to 1888, in which year the defendant constructed upon premises adjacent to those of the plaintiffs a power house, equipped with machinery and appliances necessary for the purpose of generating electricity to be supplied to the public for lighting or for power. In 1890 the plaintiffs leased their property for a term of five years, receiving a rental of $15,000 a year and certain privileges. Shortly prior to the expiration of the term of this lease the premises were again leased to the same tenant for another term of five years from May 1, 1895, at the rental of $12,000 a year, with the reservation of the same privileges as in the previous lease. In 1900 the premises were again leased at a less rental, with the reservation of some additional privileges, and with a right to the lessors to share in the profits of the hotel business conducted by the lessee. After the construction of its power house the defendant's operations caused 'soot, cinders, ashes, steam or water condensing from steam' to be discharged upon plaintiffs' premises. Noises, jars and vibrations resulted from the operation of the machinery which impaired the peaceful enjoyment of the premises and affected their rental value. The court further found that, as the machinery was used at the time of the trial, no injury was being worked to the plaintiffs' property, and 'that it was improbable that it would be so used as to work injury in the future,' but that, as the plaintiffs were entitled to the equitable relief prayed for when the action commenced, the court would retain the case and award to them their damages. Judgment was directed for the plaintiffs for such damages in the amount of $4,500. The court decided that the plaintiffs failed to establish that they suffered any damage after the year 1900, and, though the rental for the premises reserved to them in the new lease of that year was less than that for the prior term, the difference could be accounted for otherwise than by charging it to the defendant's acts. This was explained in the changed character of the locality and in the fact that the lease was not only provided that the plaintiffs should have a share of the profits, but that they should enjoy greater privileges than formerly. These findings of the trial court have sufficient support in the evidence.

"CULLEN, Ch. J.: I adopt Judge Gray's statement of facts and I agree with him in the position that this action was properly brought in equity; that it was triable by the court, and that the defendant was not entitled to a jury trial as of right. I am unable, however, to concur in the view that the plaintiffs were properly awarded damages for diminution in the rental value of the property. The plaintiffs were in possession of the premises during no part of the period for which damages have been recovered, but the same were in the occupation of their tenants under a lease for a term of years. One of these leases expired during the existence of the nuisance, and, as the trial court has found, by reason of the nuisance the plaintiffs were compelled to rent the premises for a new term at a reduced rent. It is for this loss of rent that damages have been awarded. The question as to which party, the landlord or his tenant, is entitled to recover for depreciation of the rental value by the existence of a nuisance has involved the courts in much perplexity. In the elevated railroad cases it has been settled that in the case of a lease made after the erection and operation of the railroad the landlord, not the tenant, is entitled to recover for such depreciation. Kernochan v. N. Y. Elevated R. R.[29] In the Kernochan case there is an elaborate discussion of the question by Chief Judge Andrews. A careful analysis of the opinion of the learned judge will show that the decision proceeded on the ground that the elevated road was a permanent structure and intended to be so maintained; that it was constructed in the street under legislative authority, and that as ample authority was granted to condemn any property rights on which it might trespass the lessor had no absolute remedy to compel the removal of the structure, since the right of condemnation can at any time be exercised by the defendants. The learned judge said: 'It is also a necessary deduction from the circumstances attending the making of ordinary leases of improved property, executed after the construction of the elevated railroad, that the right to recover damages is vested exclusively in the lessor.' To the doctrine of this case the court has steadily adhered. When, however, the doctrine was invoked to defeat the right of a tenant to recover damages against the present defendant for the very same acts which constitute a

29. 128 N. Y. 559.

nuisance in the case now before us, it was held that the rule in the elevated railroad cases did not apply. In Bly v. Edison Electric Ill. Co., a tenant, hiring after the nuisance was created, recovered the depreciation in the rental value of the premises. The appellate division, citing the authority of the Kernochan case, reduced the award to a nominal sum, holding that the tenant was not entitled to recover diminution in rental value.[30] On appeal to this court the judgment of the appellate division was reversed, though a new trial was ordered because the trial court had awarded damages for a period anterior to six years before the commencement of the action.[31] This court said, per Werner, J.: 'We think the Kernochan case has no application to a case like the one at bar, and this without reference to the fact that it appears affirmatively that the rental paid by the plaintiff was the same during the existence of the nuisance as it was before. The elevated railroad cases to which class the Kernochan case belongs, are *sui generis*. They are governed by the principles which apply to no other class of cases.' The elaborate discussion of the question by Judge Werner leaves nothing to be now added. It is sufficient to say that that case expressly held that a tenant under a lease made during the existence of the nuisance was entitled to recover the depreciation of the value of the occupation of the premises. It is said to be the settled rule of law 'that where the wrongful act affects different interests in the same property the owner of each interest may have his separate action against the wrongdoer. Landlord and tenant have separate actions, and each, if injured therein, may have redress, the one for the injury to the reversion, the other for the injury inflicted in diminishing his enjoyment of the premises.' This statement is doubtless correct, but under this rule 'to entitle a reversioner to maintain an action, the injury must be necessarily of a permanent character, and that a presumed intention to continue the nuisance is not sufficient, even where there is evidence that the premises would sell for less if the nuisance were continued.' (Mott v. Shoolbred,[32] opinion of Sir George Jessel, M. R.; see also cases cited in Judge Werner's opinion.). Here the only injury found by the trial court is to the enjoyment

30. 54 N. Y. App. Div. 427.
31. 172 N. Y. 1.
32. 20 Eq. Cases, 22.

and occupation of the premises. That does not affect the reversioner. Had the trial court found that the operation of defendant's light plant cracked the walls or injured the structure, such damage would be of a permanent character and the reversioner entitled to recover. In the present case, however, not only is there no permanent injury to the plaintiffs' buildings, but the defendant's plant did not constitute the nuisance, but its operation, and such operation was not necessarily or inherently injurious, because the trial court found that at the time of the trial its operation did not damage the plaintiffs. Judge Andrews said in the Kernochan case:[33] 'We should be very reluctant to make a decision which would expose the defendants to a double action in cases like this,' and I imagine that the reluctance still continues. Nevertheless, if the judgment before us is affirmed the defendant will be subjected to a double recovery against it, for under the Bly case the tenant is also entitled to recover, if in fact he has not already recovered, the diminution in the rental value during the same period for which the plaintiffs are awarded damages for such diminution. It is not a case like that suggested where the same act has caused injury to different persons and each recovers for the injury to himself, but here two parties will recover for exactly the same injury. I may suggest this further distinction between the elevated railroad cases and that of a casual temporary nuisance. In the Kernochan case the defendant, upon satisfactorily compensating the landlord, could continue the operation of its road despite the complaint of his tenant. Here no release from or settlement with the landlord could have prevented the tenant from restraining the operation of the defendant's plant. Moreover, the care by the plaintiffs was for a term of years. The right of the tenant and landlord then became fixed and the damage to the plaintiff at once. It was the diminished rent during the demised term. Had the defendant ceased the operation of its plant the day after the lease the plaintiffs' injury would have been as great as if it had maintained the operation during the whole demised term. Yet I apprehend no one will contend that the defendant would have been liable for the whole period. But if we should assume that such a contention would be well founded the result would be that the day after

33. 128 N. Y. 559.

the lease the operation of the plant might be stopped at the suit of the tenant and yet the defendant remain liable to the landlord for the loss of rent for the whole term of the lease. In other words, the defendant's liability would depend not on the injury done by its tresspass or nuisance, but on the manner in which the owner might deal with his property. The decision in the Bly case did not pass this court without discussion. On the contrary, there was a vigorous dissent by Judge Haight (concurred in by two other members of the court), who contended that the loss in rental value went to the landlord, not to the tenant. The force of this position was appreciated by the majority of the court which, when it decided that the court could recover for that loss, substantially decided that the landlord could not. I think the judgment should be reversed and a new trial granted, costs to abide event."[34]

34. The above opinion was dissented from by Mr. Justices Bartlett, Haight and Gray, Mr. Justice Gray writing the dissenting opinion. Mr. Justice Gray says: "In my opinion the right of the plaintiffs to bring and maintain this action is clear and the defendant's appeal cannot be sustained. The plaintiffs were shown to have been injured by the defendant's acts in the depreciation of the value of the property, as shown by the diminished amount of the rent for the premises reserved by the lease of 1895. For the prior term of five years from 1890, they had been receiving $15,000 a year as rent, while for the succeeding term of five years, from 1895, they were to receive only $12,000 a year. That represented a total loss to the owner of $15,000 for the new term and furnished a basis of injury, upon which this action was commenced in 1898.

"I consider it to be a settled rule of law that where the wrongful act affects different interests in the same property the owner of each interest may have his separate action against the wrongdoer. Lessor and tenant have separate estates, and each, if injured therein, may have redress—the one for the injury to the reversion, the other for the injury inflicted in diminishing his enjoyment of the premises. This rule and its reasons have been heretofore discussed with such care that I deem it necessary only to refer to the recent cases of Kernochan v. N. Y. Elevated Railroad, 128 N. Y. 559; Hine v. Same, Ib. 571; Kernochan v. Man. Ry., 161 Ib. 345, and Bly v. Edison Electric Ill. Co., 172 Ib. 1. If it be a nuisance, which is the subject of complaint as injuring adjacent property interests, the question is, when the owner not in possession sues, whether it has diminished the rental value of his property, the difference in that respect being the measure of his right to damages. When the tenant sues, his right to recover rests upon the ground that his occupancy is dis-

§ 494. Damages up to commencement of suit.—In case of nuisances, or repeated trespasses, damages can only be recovered

turbed and the full enjoyment of his possession of the premises is prevented by the common nuisance. Francis v. Schoellkopf, 53 N. Y. 152; Hine v. N. Y. Elevated Railroad, *supra;* Bly v. Edison Electric Ill. Co., *supra.* In the Bly case the question discussed was that of the tenant's right to maintain an action to abate a nuisance and for damages, when in under a lease made during the existence of the nuisance. It was held, upon a careful review of the authorities, in effect, that as there was no justification for the maintenance of that which was a nuisance, and hence an unreasonable and a wrongful use by the defendant of its property, the tenant of the property injuriously affected was not deprived of the right to bring an action by reason of having acquired the lease thereof during the existence of the nuisance at a diminished rental. The right to have compensation for injuries actually sustained and to have the nuisance abated could not thereby be affected. It was upon that proposition that the judges of this court divided in opinion. As to the right of the owner of property, though not in possession, to maintain an action to restrain the continuance of a nuisance which threatens injury to his reversionary rights and to recover for any damage which he may be able to show that he has already sustained in that respect, I think there should be no doubt. It is argued that as the nuisance arises from the method of defendant's operation of the power house, presumptively, it is but casual and temporary. That is to say, though the defendant's building and mechanical plant were permanent structures, the operation of the machinery in a way intolerable and injurious to others, as complained of, could not be presumed to continue. Assuming the correctness of the proposition, how does it affect the principle upon which the legal right of the plaintiffs was founded? They certainly had the right to protect their reversionary interests against injury. A casual or temporary trespass or nuisance, if the latter is of a casual nature, it is true, usually affects the possession of the property, and, therefore, gives a right of action to the lessee. But for a wrongful act, which diminishes the rental value of the property, and which, from the circumstances, may fairly be regarded as likely to continue, whether it be in the nature of a trespass or of a nuisance, an action will lie by a reversioner to redress the wrong, although the lessee may equally have his action to redress the wrong; although the lessee may equally have his action to redress the wrong inflicted upon his right to peaceable and comfortable possession. See Kernochan Case, 128 N. Y. 559, 566, and the English cases cited in the opinion, as well as the Bly case, *supra.* In this case the rental value of the plaintiffs' property, when the second lease was made in 1895, was diminished to the extent of $3 000 a year, under conditions of lease similar to those of the preceding, and, according

up to the commencement of the suit, because every continuance

to the findings of the trial court, the damage to the plaintiffs from defendant's operations only ceased to be inflicted in 1900. Thus the defendant's use of its power house in a way injurious to others had continued for many years after its construction. It had so seriously affected the rental value of the plaintiffs' property as to compel them to accept a reduced rental in 1895 for a further term, and when this action was commenced in 1898, the threat in the situation was the same. However, technically, the nuisance may be termed casual, as caused by the methods of the defendant in operating its power house, it was a very real menace to the plaintiffs' interest as property owners. The case, in my judgment, came within the established rule which allows an action to a lessor whose reversion is injuriously affected to abate the nuisance by restraining its continuance. To say that the nuisance was a casual or a temporary one is an answer no more satisfactory than it is complete legally to the statement of the owners that they had suffered injury in the past by its maintenance and would suffer in the future unless it was enjoined.

"It is further agreed that as the plaintiffs failed to make good their ground to equitable relief by proving that the nuisance continued to exist at the time of the trial the court should not have retained the action, but should have dismissed the complaint. It is, however, well settled that when a court of equity has gained jurisdiction of a case its jurisdiction is not affected by subsequent changes in the condition of the parties, if any cause of action survive; it may retain the case generally to do complete justice between them by awarding that measure of relief for the injury done which the case admits. The jurisdiction depended upon the situation at the commencement of the suit with respect to the right to equitable procedure and relief, but the measure of the relief would be regulated by the situation at the time of pronouncing the decree. Lynch v. Metr. Elevated Railroad, 129 N. Y. 274; Van Rensselaer v. Van Rensselaer, 113 Ib. 207; Madison Ave. Baptist Church v. Oliver Street Baptist Church, 73 Ib. 82. The trial court, therefore, committed no error in retaining the cause for the purpose of awarding damages. . . . A further question is presented with respect to the damages. The trial court awarded the sum of $4,500 for the damages sustained from a date six years prior to the commencement of the action down to the date of the trial. When the action was commenced, in 1898, the plaintiffs had submitted to a definite loss, upon the renewal of their lease, in 1895, for a term of five years, amounting to $3,000 a year, or to $15,000 for the whole period. Prior to 1895, they were receiving the rental value of their property under the lease of 1890. It was erroneous, therefore, to award damages for the period antedating the making of the new lease of 1895. Then, only, a loss was first sustained, so far as the record shows, which was recoverable, in the diminished value of the prop-

or repetition of the nuisance gives rise to a new cause of action, and the plaintiff may bring successive actions as long as the

erty due, according to the evidence, to the effects of the defendant's operation of its power house upon these dwellings and their occupants. The amount allowed by the trial court was less than one-third of the actual depreciation in rental value for the term of five years from 1895 to 1900. The Appellate Division, in affirming the judgment, have said in the opinion in respect to these damages, that they regarded the case as one where it was possible to 'separate the damage allowable from that for which a recovery could not be had,' and I think they were right. While the exercise of our jurisdiction to grant to a party such judgment as he may be entitled to (Code, § 1337), is to be exercised upon the facts found by the court below, I think it is well exercised in this case in the affirmance of the judgment, for the same reason that moved the Appellate Division Justices. The findings of fact plainly state that nothing was awarded to the plaintiffs for any damage after the year 1900. They show, equally clearly, that the only damage they had sustained before the commencement of the action was in the re-leasing of their property, in the year 1895, at a depreciation of $15,000 for the whole term of the lease. They also show that the moderate award was due to the trial judge's conviction that the depreciation in the rental value, generally, was somewhat influenced by other considerations. Therefore, his finding as to the period wherein damages were recoverable was purely formal, and, clearly, inadvertent in its formulation, in view of his previous findings of fact. There should be no difficulty in affirming this judgment when the recovery was so far within the distinct depreciation of the rental value as shown by the facts found."

In the report of this Miller case in 62 Cent. Law J. it is said (p. 245): "We consider the reasoning of the dissenting justices clearly the soundest" and we fully agree with this statement. It is also said (p. 246): "All the judges concur in the opinion that the action was not triable as of right by a jury. The majority opinion loses sight of a principle of law that is recognized in measuring damages as well as generally that all reasonable presumptions will be taken in favor of a party injured and against the party committing the wrong, therefore, if a wrong existed to the damage and annoyance of parties the presumption would be that it would continue to exist unless evidence of a substantial quality were introduced to show that it would not. With this principle in view there ought to have been little trouble in determining that the minortiy opinion is right. A court ought not to assume that an absolute injury resulting, as in this case, might not continue. It is in existence; it has continued since the complaint; and the law ought, in face of such circumstances, to aid the remedy against the wrong doer, and in measuring the damages assume that it would continue unless the contrary were made

nuisance lasts.[35] And it is held in a New York case that in an action at law to recover damages for a nuisance damages can only be recovered up to the commencement of the action and therefore permanent or fee damages for the continuance of a nuisance can only be recovered in an action in equity.[36] So the measure of damages resulting from the operation of a bakery in a residential neighborhood is the injury suffered by plaintiff down to the commencement of the action, and depreciation in the market value of the property will not be considered, there being no evidence whatever of permanent injury.[37] And in case of a nuisance occasioned by the maintenance in the street of a railroad embankment, interfering with an abutting owner's ingress and egress to and from his property, the

clearly to appear. In the principle case this was not made to clearly appear. The damages were estimated upon a proper basis that is to say, upon what the property rented for before the nuisance began and the depreciation in the rental value caused by its continuance, and the judgment of the lower court should have been sustained. The injury to the tenant was entirely different. What right would the tenant have to recover for the injury to the rental value when his occupancy under a lease was the injury he suffered? It would be a strange piece of reasoning to say that since, on account of the injury inflicted by the nuisance, A. is compelled to rent his property for less than he got for it without the nuisance, that he suffered no distinct and separate loss from that of the tenant who might occupy the premises under a new lease at a less amount of rent. The law is made not only for the purpose of commanding what is right, but to prevent wrong. To prevent wrong it sets salutary examples by bringing to its aid every reasonble intendment against the wrongdoer, therefore, its presumptions are against the wrongdoer. In a case like that under consideration, it should compensate the tenant for the annoyance caused, and the owner for the injury to the rental value upon the grounds set forth in the minority opinion.

No right of trial by jury in equitable action and verdict is merely advisory. Issue of damages. McCarthy v. Gaston Ridge Mill & Mining Co., 144 Cal. 542, 78 Pac. 7.

35. Joseph Schlitz Brewing Co. v. Compton, 142 Ill. 511, 34 Am. St. Rep. 92, 18 L. R. A. 390, 32 N. E. 693. See Cumberland & O. C. Corp. v. Hitchings, 65 Me. 140; Dorman v. Ames, 12 Minn. 451, Gil. 347; Pinney v. Berry, 61 Mo. 359; Morris Canal & Bkg. Co. v. Ryerson, 27 N. J. L. 457; Thayer v. Brooks, 17 Ohio 489, 49 Am. Dec. 474; Alexander v. Stewart Bread Co., 21 Pa. Super. Ct. 526; Stadler v. Gueben, 61 Wis. 500, 21 N. W. 629.

36. Van Veghten v. Hudson River Power Co., 92 N. Y. Supp. 956, 958.

37. Alexander v. Stewart Bread Co., 21 Pa. Super. Ct. 526.

damages recoverable are within the general rule applicable to nuisances to land and are to be admeasured by the amount of injury actually sustained at the commencement of the action, and it is not the deterioration in the market value of the land by reason of the nuisance, although the code admeasures the damages by such rule in suits for the condemnation of lands.[38] But damages for a continuing nuisance may be shown, subsequent to the filing of the original petitition, where there is an amendment filed claiming damages to the time of trial.[39] It is also held that where a sewage disposal plant is found to be a nuisance it is competent in an action in equity to receive evidence of damages which have accrued down to the time of trial.[40] And where it is both pleaded and proven by defendant that it intends to remove the alleged nuisance within a short time and thus effectually abate the claimed wrongs and injuries, the plaintiff can only recover compensation for the damage to the commencement of the action unless the injury is permanent and enduring as such pleading and proof operates to limit the damages to the above extent.[41] So permanent diminution in the value of lots can not be recovered, but only such damages as have been sustained prior to the commencement of the action where plaintiff's rights in a street have been interfered with by a railroad corporation.[42]

§ 495. **Recovery of entire damages in one action.**—Where damages are of a permanent nature and affect the value of the estate a recovery may be had of the entire damages in one action; but where the extent of the wrong can be apportioned from time to time separate actions should be brought to recover the damages

38. Coats v. Atchison (Cal. Ct. App. 1905), 82 Pac. 640.

39. Bowman v. Humphrey, 124 Iowa 744, 100 N. W. 854.

40. Gerow v. Village of Liberty, 106 N. Y. App. Div. 357.

41. Hughes v. General Electric Light & Power Co., 107 Ky. 485, 54 S. W. 723.

42. Ottenot v. New York, Lackawanna & Western Ry. Co., 119 N. Y. 603, 23 N. E. 169, 28 N. Y. St. R. Action here was to recover damages occasioned by building an embankment on adjoining street. See Jackson v. Chicago, S. F. & C. R. Co., 41 Fed. 656 (Railroad in street and action for damages); Nashville v. Comar, 88 Tenn. (4 Pick.) 415. (Negligent construction of sewer and action for damages.)

sustained.[43] So where a permanent injury is occasioned by a permanent lawful, public structure, damages past, present and future, may be recovered in one suit.[44] And where the damage to plaintiff's land is permanent and irremediable he can recover in one action all present and prospective damages, but if the injury is temporary in character and capable of being avoided without permanently injuring plaintiff's land, damages can be recovered only up to the commencement of the action, as in such case the nuisance would be a continuing one.[45] Again, where a railway is constructed without leaving sufficient space between the embankments, or it fails otherwise to provide against freshets reasonably to be expected, an injury due to that cause may be compensated for by the assessment of present and prospective damages in a single action. The measure of damages is the difference in the value of the plaintiff's land with the road so improperly constructed, and what would have been its value had the road been skilfully constructed.[46]

§ 496. **Same subject—Other statements of rule—Instances.** —Under an Arkansas decision where a nuisance is of a permanent nature and its erection and continuance are necessarily an injury, the damage it causes may be fully compensated at once and the statute of limitations runs against an action therefor from the time the nuisance is created.[47] In Indiana where a nuisance is of a character so permanent that it may fairly be said that the entire damages accrues in the first instance the statute of limitations begins to run at this time. On the other hand, where the nuisance is a continuing source of injury there is a continuing

43. Smith v. Point Pleasant & Ohio R. R. Co., 23 W. Va. 451. Examine Hargreaves v. Kimberly, 26 W. Va. 787, 57 Am. Rep. 121.

44. Joseph Schlitz Brewing Co. v. Compton, 142 Ill. 511, 34 Am. St. Rep. 92, 18 L. R. A. 390, 32 N. E. 693. See Chicago Forge & Bolt Co. v. Sanche, 35 Ill. App. 174; Bizer v. Ottumwa Hydraulic Power Co., 70 Iowa, 145; Elizabethtown L. & B. S. R. Co. v. Combs, 10 Bush (Ky.) 382, 19 Am. Rep. 67; Town of Troy v. Cheshire R. Co., 23 N. H. 83.

45. Beatrice Gas Co. v. Thomas, 41 Neb. 662, 43 Am. St Rep. 711, 59 N. W. 925.

46. Ridley v. Seaboard & Roanoke R. Co., 118 N. C. 996, 32 L. R. A. 708, 24 S. E. 730.

47. St. Louis, Iron Mountain & S. R. Co. v. Biggs, 52 Ark. 240.

right of action.[48] In Texas where a nuisance is permanent and continuing, the damages resulting from it should all be estimated in one suit; but where it is not permanent, but depends upon accidents and contingencies, so that it is of a transient character, successive actions may be brought for the injury as it occurs, and an action for such injury would not be barred by the statute of limitations unless the full period of the statute had run against the special injury before suit.[49] Again, all damages of a permanent character occasioned by the running of street cars may be recovered in one suit at law, and the injury is not such a continuing one as to warrant relief by injunction. Where the damages are of a permanent character and affect the value of an estate, a recovery may be had in one suit at law of the entire damages in one action.[50] And where a railroad company has built an imperfect and faulty bridge over a stream of water crossing its right of way, a party suffering damage therefrom has the right to regard the nuisance as of a transient character, and, instead of bringing one action for the whole injury to the value of his property resulting from the original construction of the nuisance he may sue for the amount of such injury as he suffers from its continuance. But if the injured party treats the defective structure as a permanent source of injury, and recovers the full amount of damages, both present and prospective, which his property sustains or may sustain by reason of such defective structure, he will be estopped from bringing a second action for damages.[51]

§ 497. **Direct and consequential injury.**[51a] — Though a nuisance be a public one, yet if special damage accrues to a particular person, either direct or consequential, he can recover, and upon proof of the nuisance the law infers damages. Sickness is an element of damage and discomfort and incon-

48. Peck v. City of Michigan City, 149 Ind. 670, 49 N. E. 800.

49. Austin & Northwestern Ry. Co. v. Anderson, 79 Tex. 427, 433, citing Wood on Limitation, § 371. See Umscheid v. City of San Antonio, (Tex. Civ. App.) 69 S. W. 496. Examine Neville v. Mitchell (Tex. Civ. App.), 66 S. W. 579.

50. Smith v. Point Pleasant & Ohio River R. R. Co., 23 W. Va. 451.

51. Chicago, Burlington & Quincey R. Co. v. Schaffer, 124 Ill. 112, 120, 16 N. E. 239, 14 West. Rep. 139.

51a. See §§ 39, note 117, herein.

venience, also the loss of services of children or of a wife, and medical expenses.[52] Again, a plaintiff is entitled to recover damages not only for direct but consequential injuries for injury occasioned to property adjacent to the mouth of a tunnel, caused by the smoke, cinders, gases and vibrations resulting from the operation of a railroad, where the company has not complied with a city ordinance providing certain safeguards to prevent such injury. The rule applies although there has been no taking of plaintiff's land and the road was operated under the company's charter and negligence is not shown. This is so decided in a case where a railroad was constructed through a city under an ordinance which provided that it should be built in a tunnel at certain places and that between two designated points the company should establish a station, the train shed of which should cover all of the tracks and be provided with smoke escapes twenty-five feet above the level of the street. No station or shed was erected at this point, but the road there ran through an open cut between the two tunnels. Plaintiff's property adjoined this open cut, and in the operation of the road smoke and gases were drawn out of the tunnels and cast upon plaintiff's land, and he was also subjected to an unusual degree of vibration.[53]

§ 498. **Nominal damages.**—In a trial to recover damages for a continuing nuisance if the jury find that the plaintiff has suffered no special damage, and yet find that a nuisance exists, a verdict for nominal damages is proper.[54] So nominal damages only will be awarded where there is no evidence as to the extent of the damage or that serious results followed the creation of the nuisance.[55]

52. Adams Hotel Co. v. Cobb, 3 Ind. Ty. 50, 53 S. W. 478 (Private Service). See Colstrum v. Minneapolis St. R. Co., 33 Minn. 516, 24 N. W. 255; Pottstown Gas Co. v. Murphy, 39 Pa. 257. Compare Kensigton, Com'rs & Wood, 10 Pa. 93, 49 Am. Dec. 582.

53. Baltimore Belt R. Co. & B. & O. R. Co. v. Sattler, 100 Md. 306.

54. Farley v. Gate City Gas Light Co., 105 Ga. 323, 31 S. E. 193.

55. Perry v. Howe Co-operative Creamery Co., 125 Iowa, 415, 101 N. W. 150; action in equity for injunction and for damages.

§ 499. **Negligence—Actual damages.**—Where the foundation of a suit is the active creation of a private nuisance, and not merely a wrong arising from negligence, the degree of care used by defendant in the construction of waterways is immaterial in determining plaintiff's right to recover actual damages from it.[56]

§ 500. **Duty to lessen damages.**—Where the suit is for a permanent injury to land it is proper to consider whether the injury could be obviated in whole or in part by a reasonable expenditure in removing the obstruction and no distinction exists as to a case where it is sought to recover damages to crops, or use and occupation resulting from a continuing nuisance so that in trespass on the case to lands by flooding owing to the alleged improper construction and maintenance of defendant's railroad upon and adjacent to plaintiff's lands if the plaintiff could, by the exercise of reasonable diligence, by work on his own land, have lesssened the damages or obviated them in whole or in part it was his duty to have done so. In such case the measure of damages would be the loss sustained before he could in the exercise of reasonable diligence have abated the nuisance, together with all cost and expense of abating it.[57]

§ 501. **Actual damages—Additional damages.**—A person may not only be entitled to recover such damages as will compensate him for injury to his property, but also be entitled to recover for the discomforts suffered by him and his family in addition to the actual damage done to his property, or be entitled to recover for such discomforts even though his property has sustained no actual damage, as in a case where sawdust blown from defendant's mill injures plaintiff's property, etc.[58] And where a

56. Alabama Consolidated Coal & Iron Co. v. Turner (Ala. 1905), 39 So. 603.

Distinction between negligence and nuisances. See § 18, herein.

As to negligence or contributory negligence. See §§ 45-47 herein.

57. Atchison, Topeka & Santa Fe Ry. Co. v. Jones, 110 Ill. App. 626. See Joyce on Damages as to duty to lessen damages generally, §§ 194, 195, 1005, 1068, 1288, 1424, 2224, 2236.

58. Mahan v. Doggett, 27 Ky. L. Rep. 103, 84 S. W. 525.

nuisance affects real estate, damages at law for the maintenance of such nuisance are not admeasured merely by the depreciation of the property, but also by the personal discomfort occasioned thereby and any cause producing a constant apprehension of danger.[59] Again, where ties were placed upon the highway in front of plaintiff's residence, causing water to collect and become foul and stagnant and to decompose the timber, causing offensive odors and sickness, the items of damage resulting therefrom and recoverable are loss of time, all the discomforts in the house caused thereby, such as vile odors, whether mental or bodily pain or both were occasioned; but no recovery can be had for the unsightly appearance presented by the ties nor the marring of the view in front of the house. If recovery is sought for mental pain, there should be some proof that such pain existed, and where the verdict does not show how much time was lost no recovery can be had therefor.[60] No recovery of damages can be had for the removal by defendants against plaintiff's will of an embankment or fill, across and in a canal, unless the removal produces a nuisance, but if it does produce a nuisance and the jury so find, it is their duty to find damages in such sum as will fully compensate the plaintiffs for all loss sustained in consequence of removing such embankment, not exceeding the sum claimed in the complaint.[61] And the measure of damages occasioned by a cesspool on defendant's lot, owing to a sewer being so improperly constructed or out of repair that a tenant in its ordinary use caused the damage to plaintiff, is what it would cost to remove such nuisance or restore the property to its former condition, including the loss of the enjoyment of the premises *ad interim*.[62] But in an action to abate a nuisance and for damages, caused by digging a ditch upon the land of plaintiff, the cost of filling up the ditch and restoring the land to its original condition is not the proper measure of damages, as the plaintiff could only

59. Baltimore & Potomac R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739.

60. Houston East & West Tex. Ry. Co. v. Reasonover, 36 Tex. Civ. App. 274, 81 S. W. 329.

61. Learned v. Castle (Cal., 1884), 4 Pac. 191.

62. Ward v. Gardner, 1 Pa. Cas. 339, 4 Pac. 191.

recover for the injury sustained and it is improper to award compensation for an expense that might never be incurred, and it is possible that such cost of filling might far exceed any injury resulting from existing conditions, and the amount so recovered might never be used for such purpose, although there are cases in which prospective damages may be recovered.[63]

§ 502. **Life tenant—Rental value—Additional damages.**—A life tenant who suffers inconvenience and discomfort in the occupancy of his house by reason of coke ovens wrongfully erected in a street in front of his premises is entitled to recover the entire rental value of the property during the time the ovens are maintained, if the premises during such time have been untenantable; and in addition he would be entitled to add any specific items of injury done by the smoke from such ovens to his furniture or to the house itself.[64]

§ 503. **Punitive damages.**.—Punitive damages may be awarded against a railroad company for refusing after request to remove from a ditch near plaintiff's premises the carcasses of animals which it had killed and knocked therein, and the odor from which rendered life in her dwelling house almost unbearable.[65]

§ 504. **Damages—Pleading—General decisions.** — Where the declaration alleged that the market value of a lot belonging to the plaintiff had been depreciated in the sum of three thousand five

63. De Costa v. The Massachusetts, Flat Water & Mining Co., 17 Cal. 613.

64. Herbert v. Rainey, 162 Pa. St. 525, 34 W. N. C. 494, 29 Atl. 725.

65. Yazoo & M. V. R. Co. v. Sanders (Miss., 1906), 40 So. 163. The court, per Truly, J., said: "A more flagrant, unwarrantable and oppressive violation of the trampling upon the rights of the public was never presented to an appellate court. To wilfully commit a trespass upon the rights of an individual is of itself sufficient to permit the awarding of punitive damages, though committed upon but one single occasion. What, then, must be said of a case where for each minute of the time, by day and by night, from day to day, there was a continued violation of the rights of the appellee by the commission of an act which rendered the enjoyment, and practically the habitation of her home impossible." See Joyce on Damages, § 2153.

hundred dollars, by reason of a nuisance created and maintained by the defendant, such an allegation is subject to special demurrer on the ground that it fails to state what was the value of the lot before the injury, which was that of an alleged damage consequent upon the discharge of impure, filthy water on premises below defendants.[66] So the answer in a suit for pollution of waters by sewage should, where the averments of complainants state their damages as "calculated upon the basis of said injuries being permanent," declare by way of counter statement whether it is intended to pollute the waters of the river for an indefinite time, or whether it intends to stop polluting them within a definite period, and if the latter is intended, the period should be designated in order to enable complainants' damages to be definitely ascertained if computed on that basis, since only be naming a definite period is it possible to compute damages on any other theory than a permanent one.[67] Again, where a person seeks an injunction to restrain a nuisance, a temporary injunction may issue even though he does not allege that he has suffered damage in any specific sum, or demand damages in any specific sum, where there is a sufficient allegation of substantial injuries as well as a showing that a continuance of the nuisance will work serious and irreparable injury to his business.[68]

§ 505. **Waiver of irregularities in taking land by accepting damages.**—If a land owner chooses to waive irregularities in the taking of land, for a hospital for contagious diseases, under a statute, and accepts payment of the damages, it is a good taking as to him. Such statutes are for the protection of the public health, are wholesome and reasonable and violate no constitutional provision, and such hospital being under the supervision of the board of health is not to be assumed in advance to be either a public or a private nuisance.[69]

66. City Council of Augusta v. Marks (Ga., 1905), 52 S. E. 539.

67. Doremus v. Mayor, etc., of Paterson (N. J. E., 1905), 62 Atl. 3.

68. Nisbet v. Great Northern Clay Co. (Wash., 1905), 83 Pac. 14.

69. Manning v. Bruce, 186 Mass. 282.

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